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IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the State of New York, consistent with the Due Process Clause of the Fourteenth Amendment, require foreign unlicensed reinsurers to post a bond before they may defend suits brought against them in New York that have not been subjected to even a preliminary judicial assessment of their merits?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Seguros La Republica, S.A., is an insurance company organized under the laws of Mexico, and located in Mexico City, D.F. Its parent corporation is Grupo Financiero Interacciones, S.A. de C.V., whose stock is publicly traded on the Mexican stock exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seguros La Republica, S.A. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on May 4, 2000.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 212 F.3d 138 (2d Cir. 2000) and is reprinted in Appendix ("App.") A hereto. The unreported Summary Order of the Second Circuit, issued on the same day as the reported opinion, is reprinted in Appendix B. The Default Judgment entered by the United States District Court for the Southern District of New York on May 18, 1999, is reprinted in Appendix C. The Order of the District Court entered on August 18, 1993, is reprinted in Appendix D. The Memorandum Opinion and Order entered by the District Court on June 16, 1992, the April 13, 1992 Report and Recommendation, and the March 23, 1992 Report and Recommendation, are reprinted in Appendixes E, F and G, respectively.

STATEMENT OF JURISDICTION

The Second Circuit filed its opinion on May 4, 2000. (App. A). The jurisdiction of this Court rests on 28 U.S.C. § 1254. Because petitioner challenges the constitutionality of Section 1213 of the New York Insurance Code, the provisions of 28 U.S.C. § 2403(b) may apply. Petitioner has served this Petition upon the Office of the Attorney General of the State of New York. Neither the District Court nor the Second Circuit certified to the Attorney General of the State of New York that the constitutionality of Section 1213 was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, as well as Sections 1101, 1102, 1213, 1301 and 4104 of the New York Insurance Code, which are reprinted in Appendix H.

STATEMENT OF THE CASE

On April 12, 1990, American Centennial Insurance Company ("ACIC"), a Delaware insurance company located first in New Jersey and later in Delaware, filed suit against Seguros La Republica, S.A. ("La Republica"), a Mexican insurance company located in Mexico City, D.F., in the United States District Court for the Southern District of New York. In its Complaint, ACIC alleged that: (i) it "issued to its insureds various insurance policies;" (ii) it "entered into reinsurance agreements, memorialized in certificates of facultative reinsurance issued by [La Republica] to ACIC, pursuant to which [La Republica] agreed and was obligated to reimburse ACIC for a share of losses and expenses arising from the underlying insurance policies;" (iii) it "paid losses and expenses to, or on behalf of, its insureds;" and (iv) La Republica's share of ACIC's losses and expenses under the facultative certificates was $3,475,647.27. An exhibit to the Complaint identified the twenty-six separate facultative certificates by certificate number and by the reinsured, ACIC insurance policy number, and set forth the amount ACIC sought to collect under each certificate. ACIC alleged it was due this amount under alternate theories of liability. ACIC also requested a judgment declaring that La Republica "is obligated to pay amounts that come due under the facultative certificates in the future when and as billed."

On October 18, 1990, La Republica filed its motion to dismiss the Complaint on the ground that the District Court lacked personal jurisdiction over it and because La Republica was not properly served with process in Mexico. On April 8, 1991, the District Court denied that motion, and on May 7, 1991, La Republica filed its Answer to the Complaint, denying all liability for amounts allegedly due under the facultative certificates. On June 28, 1991, ACIC filed a motion requesting the District Court to require La Republica to post a pre-answer bond pursuant to Section 1213 of the New York Insurance Code, N.Y. Ins. Law § 1213 (McKinney 1985) ("Section 1213"), or to strike La Republica's Answer. Over La Republica's objections, and rejecting La Republica's argument that Section 1213 violated La Republica's right to due process under the Fourteenth Amendment to the United States Constitution, the District Court granted that motion and ordered La Republica to post a $5,700,000 bond to secure payment of any final judgment in both this action, in which ACIC sought $3,475,647.27, and in a related proceeding pending between the parties in the District Court. (App. E). Although the related proceeding was later dismissed, *American Centennial Ins. Co. v. Seguros La Republica*, 1996 WL 304436 (S.D.N.Y. 1996), the amount of the bond remained unchanged.

On July 21, 1992, La Republica's counsel advised the District Court that it could not post the bond, and subsequently explained to the District Court that Article 64 of Mexico's General Law of Insurance Institutions and Mutual Companies prohibited La Republica from pledging its assets, which it would be required to do in order to obtain a pre-answer bond. Nonetheless, ACIC moved to strike La Republica's Answer and to enter a default judgment. Before ruling on that motion, the District Court first conducted an

evidentiary hearing to determine whether it had personal jurisdiction over La Republica. (App. D). Upon finding such jurisdiction, the District Court struck La Republica's Answer, and, after conducting an evidentiary hearing on damages, entered a default judgment against La Republica in the amount of $11,801,024.98, and issued a declaration that "by virtue of Defendant's default in this matter, . . . Defendant is obligated to pay any amounts billed by Plaintiff in the future arising out of the facultative certificates listed in Exhibit B to the Court's Order and Opinion dated May 10, 1999." (App. C).

On June 16, 1999, La Republica appealed the default judgment to the United States Court of Appeals for the Second Circuit. In its published opinion, the Second Circuit affirmed the District Court's ruling that Section 1213 was constitutional, but did so on different grounds. (App. A). While the District Court held that this Court's analysis under *Connecticut v. Doehr*, 501 U.S. 1 (1991), and other "creditor's remedies cases" were not applicable, the Second Circuit held that Section 1213 was an attachment statute, that the standards set forth in *Doehr* were applicable, but that the statute conformed to those standards. In a separate unpublished summary order entered the same day, the Second Circuit vacated and remanded part of the District Court's rulings regarding damages, and affirmed the District Court's remaining rulings regarding damages, personal jurisdiction and service of process. (App. B). La Republica does not concede and contests the correctness or validity of those rulings, and it does not waive any future recourse under Mexican law relating thereto.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S RULING THAT SECTION 1213 AUTHORIZES A CONSTITUTIONAL PRE-JUDGMENT ATTACHMENT CONTRADICTS THIS COURT'S RULING IN *DOEHR v. CONNECTICUT*

Section 1213(c)(1) requires that before any unauthorized foreign or alien insurer files a pleading in a lawsuit brought against it, the insurer must either post a bond with the clerk of court in an amount "sufficient to secure payment of any final judgment which may be rendered in the proceeding" or obtain a New York insurance license. In this case, the District Court ordered La Republica to post a $5,700,000 bond, and when La Republica did not do so, the District Court struck La Republica's Answer, held La Republica in default, and entered judgment against La Republica in the amount of $11,801,024.98. In rejecting La Republica's argument that Section 1213 violated its right to due process, the District Court held that this Court's holding in *Doehr v. Connecticut*, 501 U.S. 1 (1991), did not apply. On appeal, the Second Circuit correctly held that Section 1213 "is the functional equivalent" of a prejudgment attachment and that the due process standards set forth in *Doehr* applied. However, the Second Circuit's application of those standards contradicts this Court's decision in *Doehr*, and erred in finding that Section 1213 is constitutional.

A. Section 1213 Impaired La Republica's Property Interest In $5,7000,000 Of Its Assets

The first inquiry in determining the constitutionality of a pre-judgment attachment statute is whether there is a significant private interest which will be affected by the attachment. *Doehr*, 501 U.S. at 11. As this Court held in *Doehr*, an attachment need not be a complete or permanent deprivation of property in order to trigger due process concerns. *Id.* at 12. Instead, "the temporary or partial impairment to property rights that attachments, liens and similar encumbrances entail are sufficient to merit due process protection." *Id.* The Second Circuit correctly held that Section 1213's requirement of posting a bond is the equivalent of an attachment because it forces foreign insurers "to place some of their assets in the hands of the United States courts for an indefinite period" during which time the insurer "would have no access to those assets. (App. A at 7a, *quoting*, *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995)). Thus, Section 1213 affects La Republica's significant property interest in $5,700,000 of its assets.

Although the Second Circuit acknowledged that Section 1213 had this effect, it nonetheless held that La Republica had no protectable interest at stake because La Republica had "an alternate means of protecting its property: it will be excused from the requirement if it obtains a license to do an insurance business in New York." (App. A at 11a). Thus, the Second Circuit held that the security requirement of Section 1213 was "simply a means of avoiding state licensing requirements, a right the insurer does not have." (App. A at 11a). This ruling is wrong because it assumes that La Republica must be licensed in order to enter into

reinsurance contracts. However, New York does not require La Republica or any other reinsurer to obtain a license in order to legally engage in reinsurance transactions, including the transactions which were the subject matter of this lawsuit. Under Section 1102(a) of the New York Insurance Code, N.Y. Ins. Law § 1102(a) (McKinney 1985), no person or entity may do an "insurance business" in the State of New York unless authorized to do so by a license. However, the term "insurance business" does *not* include reinsuring risks of insurance companies. N.Y. Ins. Law § 1101(b)(2)(G) (McKinney 1985).[1] Because a reinsurer such as La Republica does not have to obtain an insurance license in order to legally enter into a reinsurance transaction, La Republica did not need to "avoid state licensing requirements" by posting a bond. (App. A at 11a). Thus, the Second Circuit's determination that La Republica did not have any interests affected by the pre-judgment attachment was clearly wrong. Instead, the District Court's order requiring La Republica to post a $5,700,000 bond pursuant to Section 1213 significantly affected La Republica's property interest in its assets.

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1. The Second Circuit relied upon the language of Section 1102(a) in finding that the pre-answer security requirement in Section 1213(c) applied to reinsurance companies such as La Republica. (App. A at 4a-6a). In the District Court La Republica unsuccessfully argued that while the service of process provisions in Section 1213(b) may be applicable to reinsurers through Section 1102(a), the pre-answer bond requirements in Section 1213(c) are not. La Republica's argument was predicated on the fact that the "doing of an insurance business" language in Section 1102(a) was relevant only to the similar language contained in the service of process provision of Section 1213(b).

B. Imposing a $5,700,000 Pre-Answer Bond Without First Making A Preliminary Determination Of The Merits Of The Plaintiff's Claims Is Contrary To The Rulings Of This Court In *Doehr, Fuentes* And *Sniadach* And Creates A Substantial And Unconstitutional Risk Of The Erroneous Deprivation Of La Republica's Property

The second inquiry into the constitutionality of a pre-judgment attachment statute is whether there is a substantial risk that the attachment statute will erroneously deprive the defendant of its property. *Doehr*, 501 U.S. at 12. In *Doehr*, this Court held that a Connecticut statute which permitted the attachment of property merely because the plaintiff was able to allege a complaint which survived a motion to dismiss was unconstitutional because the risk of erroneous deprivation was too great:

> Permitting a court to authorize attachments merely because the plaintiff believes that the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these circumstances is self evident and too great to satisfy the requirements of due process absent any countervailing consideration.

Id. at 13. These same considerations show that Section 1213 deprives La Republica of property without due process of

law. Like the statute at issue in *Doehr*, Section 1213 requires a court to impose a bond upon a defendant merely because the plaintiff is able to state a facially valid complaint, even if the defendant denies the claims raised and disputes the facts alleged in that complaint. In this case, La Republica filed an answer which disputed the allegations made in the complaint and denied liability, but the District Court nonetheless ordered La Republica to post a $5,700,000 bond. Thus, like the Connecticut statute at issue in *Doehr*, Section 1213 presents a substantial risk of erroneous deprivation of La Republica's property. Indeed, this risk is clearly demonstrated by the fact that one of the two cases for which the bond was ordered was subsequently dismissed, and in this case, the Second Circuit held that the District Court erroneously awarded the plaintiff $740,055.77, before interest, and remanded that part of the award for further proceedings. (App. B at 17a).

The Second Circuit attempted to distinguish the holdings of this Court in *Doehr*, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), on the ground that those cases involved statutes providing for *ex parte* attachments, whereas Section 1213 "mandates court supervision before an insurer may be required to post [a] preanswer security" and that defendants are provided with "notice and an opportunity to be heard." (App. A at 11a). However, La Republica was not given an opportunity to be heard on the constitutionally significant issue of the likelihood of success of the plaintiffs' claims against La Republica before the pre-answer bond was imposed. Instead, the District Court merely rubber-stamped the plaintiff's request for a $5,700,000 pre-answer bond, ruling that "the merits of the case have no bearing on the posting of security." (App. G at 41a). However, as this Court held in

Doehr, *Fuentes*, and *Sniadach*, due process requires that a court provide actual supervision by making a preliminary determination into the merits of the plaintiff's claim before granting the attachment. *See Doehr*, 501 U.S. at 14 ("The State urges that the reviewing judge normally reviews the complaint as well [as the plaintiff's affidavit], but concedes that the complaint may also be conclusory. It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions"); *Fuentes*, 407 U.S. at 83 ("Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides — and does not generally take even tentative action until it has itself examined the support for the plaintiff's position"); *Sniadach*, 395 U.S. at 343 (HARLAN, J, concurring) ("I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use"). Because Section 1213 does not provide for any pre-attachment determination of the merits of the plaintiff's claim, the statute presents a substantial, and unconstitutional, risk of erroneous deprivation of a defendant's property.

The Second Circuit also stated that it would uphold the constitutionality of Section 1213 even if the bond were imposed *ex parte* because the plaintiff's claim, that La Republica "owes it a sum of money under a set of contracts — appears to fall into the category of cases cited in *Doehr* as 'lend[ing] themselves to accurate ex parte assessments of the merits.' " (App. A at 12a n.3). This statement, however, is wrong. First, the District Court did

not even make an *ex parte* assessment of the merits of the plaintiff's claim before it ordered La Republica to post a $5,700,000 pre-answer bond. Instead, it held that "the merits of the case have no bearing on the posting of security." (App. G at 41a). Further, the issues in this case do not lend themselves "to accurate ex parte assessments of the merits." (App. A at 12a). The claims asserted by ACIC against La Republica involve issues of interpretation of both the twenty-six facultative reinsurance certificates La Republica allegedly issued to ACIC and the twenty-six insurance policies ACIC issued to its insureds. Unlike a collection case for an amount due for goods or services rendered, the claims by ACIC involve a fact-intensive inquiry as to whether the amount claimed arose from the type of occurrence and the time period covered by the reinsurance contract. In many cases, the occurrence at issue was pollution which took place over a period of decades.

For example, ACIC alleged that it paid loss adjustment expenses to, or on behalf of, its insureds under the insurance policies it issued, and sought payment by La Republica for its share of those expenses under the facultative reinsurance certificates. However, ACIC later conceded that $687,068.55 of the expenses it sought from La Republica were not paid to or on behalf of its insureds, as alleged in the complaint, but instead were incurred in defending itself in declaratory judgment lawsuits brought by ACIC's insureds against ACIC seeking insurance coverage under the insurance policy. This concession would not have been made in an *ex parte* assessment of the merits of the complaint. Nor could the issue have been addressed by a motion to dismiss the Complaint because the Complaint itself did not make clear that ACIC was seeking these recoveries. Nonetheless, the District Court awarded the plaintiff these amounts, holding

that La Republica waived all objections to that award through its default. The Second Circuit vacated that award, finding that the issues of "whether the policies covered the declaratory judgment expenses and whether the complaint adequately requested this relief" were not waived by La Republica's default. (App. B at 17a). Thus, the District Court was unable to make an accurate assessment of the merits of ACIC's claim for recovery of these declaratory judgment expenses.

C. Neither The Plaintiff Nor The State of New York Has Any Significant Interests Justifying Imposing a Pre-Answer Bond Upon La Republica

The third inquiry into the constitutionality of a pre-judgment attachment statute requires "principal attention to the interests of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interests the government may have in providing the procedure or forgoing the added burden of providing the greater protections." *Doehr*, 501 U.S. at 11. However, the State's "substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves." *Id.* at 16. In *Doehr*, the plaintiff had no existing interest in the defendant's property when he sought the attachment, and his only interest in the attachment was "to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action." *Id.* This Court held that this *de minimus* interest did "not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery." *Id.*

Although the plaintiff in this case had no existing interest in La Republica's assets at the time it sought the imposition

of the pre-answer bond, the Second Circuit nonetheless held that the plaintiff shared with the State of New York the interests of "ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid, instead of requiring claimants to resort to far-flung forums for satisfaction of their judgments," and "in ensuring that businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim," and that these interests were sufficient to support the constitutionality of Section 1213. (App. A at 9a, 10a). However, none of these state interests are reflected in the New York Insurance Code and they are not applicable to reinsurance companies.

The Second Circuit relied upon the New York Court of Appeals' decision in *Curiale v. Ardra Insurance Co., Ltd.*, 88 N.Y.2d 268, 277 (1996), in holding that the purpose of Section 1213 was to prevent New York citizens from resorting to "far flung forums for satisfaction of their judgments." (App. A at 9a, *quoting Curiale*, 88 N.Y.2d at 277). However, neither the language of Section 1213 nor the legislative history quoted by the court in *Curiale* supports this supposed state interest. The purpose of Section 1213, as stated in its preamble, is to provide New York citizens a means by which to serve process upon unlicensed insurance companies and bring actions against them in New York courts. N.Y. Ins. Law § 1213(a) (McKinney 1985).

Nowhere in Section 1213 does it state that its purpose is to ensure the availability of funds to satisfy possible future judgments. The New York Insurance Code itself does not reflect this interest because it does not require *licensed* foreign insurers to maintain assets in the State of New York

in order to satisfy judgments brought against them. The only requirement imposed upon licensed foreign property and casualty insurers to maintain assets in the State of New York is that the insurer deposit no more than $500,000 with the New York Superintendent of Insurance. N.Y. Ins. Law §§ 4104(a), 4104(d). However, a licensed foreign insurer is excused from doing so if the foreign insurer provides a certificate showing that it deposited that amount with the "proper state official of the state under whose laws such company is organized." N.Y. Ins. Law § 4104(d). Thus, the New York Insurance Code anticipates that a licensed foreign insurer may not have any assets within the State and that a New York citizen could be required to resort to a "far flung forum" to enforce a judgment against that insurer. Finally, as this Court held in *Doehr*, making assets available to satisfy a future judgment in a case is an insufficient interest to justify a pre-judgment attachment. *Doehr*, 501 U.S. at 16.

The legislative history shows that in enacting Section 1213, the New York legislature was concerned about "legitimate expectations of the public" in dealing with unlicensed insurers:

> In view of the regulations of financial affairs of insurers, the act of a foreign or alien insurer in issuing and delivering policies, soliciting applications for insurance, collecting premiums on (and thus keeping in force) existing insurance, or transacting business in such a way that it appears to the public view as a lawful and authorized insurer, is, in a practical sense a holding out or representation [sic] to the insured that it will conduct its affairs in such a way that funds will be accessible for satisfaction of any judgment based on a claim connected with the contract.

Curiale, 88 N.Y.2d at 275-276. These "expectations" do not exist in a reinsurance transaction. First, reinsurers do not deal with the public but instead deal solely with sophisticated insurance companies such as the plaintiff. Thus, the consumer protection interests underlying Section 1213 are not present. In addition, insurance companies have no expectation that foreign reinsurers such as La Republica maintain any assets in New York to pay claims or satisfy judgments against them. Indeed, the New York Insurance Code recognizes that reinsurance companies' assets may be located in a different state or country, and thus puts the burden on the domestic insurance company seeking to take credit for such reinsurance on its financial statement to first arrange security for payment by the reinsurer, such as withholding from the reinsurer all or a portion of the reinsurance premium and placing it in a trust account located in New York. N.Y. Comp. Codes of R. & Regs. tit. 11, § 125.4(e); N.Y. Ins. Law § 1301(14) (McKinney 1985). In this case, the plaintiff knew it was dealing with a Mexican reinsurance company which had no assets within the State of New York, and therefore arranged for security for payment by La Republica by placing all of the reinsurance premiums, over $9,000,000, in a trust account in New York, and later withdrew that entire account to pay various claims under the reinsurance contracts.

Section 1213 is being used in this case to punish La Republica for entering into reinsurance contracts with ACIC without first having a New York insurance license, even though New York law does not require reinsurers like La Republica to be licensed. This misplaced sense of punishment, being required to either post a $5,700,000 pre-answer bond or be held in default, is the modern-day resurrection of the ancient, and now plainly unconstitutional,

custom of outlawry, under which "he who defied [the law] was outside its sphere; he was outlaw." 2 F. Pollack & F. Maitland, *The History of English Law* 449 (1968). A defendant was "exacted, proclaimed, or required to surrender, at five county courts" and if he "does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise." 4 W. Blackstone, *Commentaries* *319 (emphasis in original). In its original and most draconian form, outlawry relegated the defendant to a Hobbesian state of nature:

> He who breaks the law has gone to war with the community; the community has gone to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man," he is a wolf.

2 Pollack & Maitland at 449. *See also* 4 W. Blackstone at *320 ("having renounced the law, [the outlaw] was to be dealt with as in a state of nature").

It is no surprise that outlawry, whatever its vigor in medieval law, cannot be reconciled with the due process of law guaranteed by the Constitution. In rejecting the proposition that courts have equitable power "to suppress an answer and thereupon render a decree *pro confesso*" in *Hovey v. Elliott*, 167 U.S. 409, 444 (1897), this Court explained that "if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be part of the

chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." Consequently, "the severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law." *Green v. United States*, 356 U.S. 165, 171 (1958). The gravamen of *Hovey*, *Green*, and other cases[2] is, of course, that the constitutional rejection of outlawry has rejected with it even the modern, less barbaric forms of the practice. In this case, La Republica did not break the law by entering into the reinsurance contracts with ACIC. It is nevertheless being punished, unconstitutionally, as if it had.

II.

THE QUESTION PRESENTED IS IMPORTANT BECAUSE IT HAS A PROFOUND EFFECT ON THE GLOBAL REINSURANCE MARKET

The purpose of reinsurance is to protect an insurance company against losses under its insurance policies. Strain, *Reinsurance* 13 (rev. ed. 1997). Reinsurance also permits an insurance company to issue insurance policies for an amount larger than the amount the insurer is ordinarily willing to retain for its own account. *Id. See also* Carter, *Reinsurance* 8 (2d ed. 1983) ("Reinsurance also provides an insurer with additional underwriting capacity in that he can

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2. *See also Degen v. United States* 517 U.S. 820, 828 (1997) (fugitive disentitlement doctrine did not permit district court to enter summary judgment in favor of government in civil forfeiture case because such a sanction would be an "arbitrary response"); *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244-46 (1993) (federal court may not use disentitlement doctrine to dismiss an appeal by a fugitive before the appeal was filed).

both accept larger risks than otherwise would be possible and sometime accommodate existing policyholders by writing types of business which normally he would prefer to avoid"). This extra capacity and flexibility provided by reinsurance allows insurers of all size to compete for insurance business, which ultimately benefits the insurance consumer. Carter at 8-9. However, in order to take full advantage of the benefits of reinsurance, domestic insurance companies need access to the entire global reinsurance market. Strain at 14. If a state imposed a licensing requirement on reinsurance companies, then insurance companies from that state would have access to only a small portion of the global reinsurance market. Insurers would be less able to financially or geographically spread risks to protect themselves and their insureds from catastrophic losses from events such as storms, fires, and earthquakes. It is for this reason that states do not require reinsurance companies to be licensed.

However, New York and twenty-six other states have enacted statutes which the Second Circuit and other courts have held as requiring reinsurers to either obtain an insurance license or post a pre-answer bond.[3] Private plaintiffs in these

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3. Alabama (Ala. Code § 27-10-53); Alaska (Alaska Stat. § 21.33.031); California (Cal. Ins. Code § 1616); Colorado (Col. Rev. Stat. § 10-3-1004); Connecticut (Conn. Gen. Stat. § 38a-27); Hawaii (Haw. Rev. Stat. § 431:8-208); Illinois (215 ILCS 5/123); Kansas (Kan. Stat. Ann. § 40-2003); Kentucky (Ky. Rev. Stat. Ann. § 304.11-040); Louisiana (La. Rev. Stat. Ann. § 22:1255); Massachusetts (Mass. Gen. Laws ch. 175B, § 3); Minnesota (Minn. Stat. § 60A.21); Mississippi (Miss. Code Ann. § 83-21-45); New Hampshire (N.H. Rev. Stat. Ann. § 606-B:6); New Mexico (N.M. Stat. Ann. § 59A-15-8); New York (N.Y. Ins. Law § 1213);

(Cont'd)

cases, including those who have no connection with the state, are increasingly using these statutes to provide them with a tactical advantage in lawsuits and arbitrations against reinsurers. C. Hitchcock & P. Biging, *Tactical Use of State Laws Requiring Unauthorized Insurers to Post Preanswer Security*, 31 Tort & Ins. Law J. 767, 768-9 (Spring 1996) ("Accordingly, recognizing the tactical leverage afforded thereby, ceding insurers (and state insurance commissioners in their capacity as liquidators of insolvent ceding insurers) increasingly have invoked these provisions in an effort to

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North Carolina (N.C. Gen. Stat. § 58-16-35); North Dakota (N.D. Cent. Code § 26.1-02-12); Puerto Rico (P.R. Laws Ann. tit. 26, § 1006); South Carolina (S.C. Code Ann. § 38-25-550); South Dakota (S.D. Codified Laws § 58-8-13); Tennessee (Tenn. Code Ann. § 56-2-607); Texas (Tex. Ins. Code Ann. Art. 1.36); Utah (Utah Code Ann. § 31A-15-107); Vermont (Vt. St. Ann. tit. 8, § 3387); Virginia (Va. Code Ann. § 38.2-806); West Virginia (W. Va. Code § 33-4-13). In addition, the following states have enacted similar statutes but exclude reinsurers from their scope: Arizona (Ariz. Rev. Stat. §§ 20-401.01(B)(2), 20-405); Arkansas (Ark. Code. Ann. §§ 23-65-204, 23-65-205); Delaware (Del. Code Ann. tit. 18, §§ 2106-2107); Florida (Fla. Stat. Ann. §§ 626.908, 626.912); Georgia (Ga. Code Ann. §§ 33-5-57, 33-5-59); Guam (22 Guam Code Ann. §§ 15204, 15207); Idaho (Idaho Code §§ 41-1208, 41-1210); Indiana (Ind. Code §§ 27-4-4-4, 27-4-4-6); Iowa (Iowa Code §§ 507A.4, 507A.7); Maine (Me. Rev. Stat. Ann. tit. 24-A, §§ 2106, 2107); Missouri (Mo. Rev. Stat. §§ 375.281, 375.301); Montana (Mont. Code Ann. §§ 33-1-614, 33-1-615); Nebraska (Neb. Rev. Stat. §§ 44-2002, 44-2005); Nevada (Nev. Rev. Stat. §§ 680A.070, 685B.030, 685B.060); New Jersey (N.J. Stat. Ann. §§ 17:51-2, 17:51-3); Ohio (Ohio Rev. Code Ann. §§ 3901.17, 3901.18); Oregon (Or. Rev. Stat. §§ 746.340, 746.360); Pennsylvania (40 Pa. Cons. Stat. § 46); Rhode Island (R.I. Gen. Laws §§ 27-16-1.2, 27-16-1.5); Wyoming (Wyo. Stat. Ann. §§ 26-12-204, 26-12-205).

compel reinsurers to post the entire amount of any claimed reinsurance recoveries before any litigation or arbitration of the merits of their claims has been undertaken"). Thus, reinsurers may be required to post bonds of millions, or tens of millions, of dollars before they can even answer the claims, and deny the allegations, brought against them. *Id.* If the reinsurer is unable to post the bond, default judgment is entered against it, regardless of the merits of the plaintiff's claim.

This Court should determine the constitutionality of pre-answer bond statutes such as Section 1213 not only because of their widespread enactment, but also because of the significant effect these statutes have on the global reinsurance market. Only a few courts have addressed the issue of these statutes constitutionality, and, like the Second Circuit in this case, the other courts did not correctly apply the standards set forth by this Court in *Doehr*. *See, e.g.*, *Lakehead Pipe Line Co., Inc. v. American Home Assur. Co.*, 981 F. Supp. 1205 (D. Minn. 1997); *Mid-American Indemn. Ins. Co. v. King*, 1995 WL 407388 (S. Ct. Tex. 1995); *Trihedron Int'l Assur. Ltd. v. Superior Court*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (1990).

CONCLUSION

For the reasons stated herein, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MAY 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: January 26, 2000 Decided: May 4, 2000)

Docket No. 99-7721

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Plaintiff-Appellee,

— v. —

SEGUROS LA REPUBLICA, S.A.,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, STRAUB, and POOLER,

Circuit Judges.

* * *

PER CURIAM:

Seguros La Republica ("Seguros") appeals from a default judgment of the United States District Court for the Southern

District of New York (John F. Keenan, *Judge*). By a summary order filed concurrently with this opinion, we reject most of Seguros's claims on appeal. In this separate opinion, we address its argument that the security requirement of New York Insurance Law § 1213 violates the defendant's right to due process. For the reasons that follow, we affirm the District Court's order deciding that there was no due process violation. *See American Centennial Ins. Co. v. Seguros La Republica, S.A.*, No. 90 Civ. 2370, 1992 WL 147626 (S.D.N.Y. June 16, 1992) (adopting Magistrate Judge's Report and Recommendation, dated March 23, 1992, and rejecting the defendant's due process challenge to § 1213(c)).

BACKGROUND

This case arises out of Seguros's alleged failure to pay a predecessor-in-interest of British International Insurance Co. ("BIIC"), American Centennial Insurance Company ("ACIC"), pursuant to twenty-six reinsurance certificates. During the course of the litigation, ACIC moved for an order compelling Seguros to post pre-answer security in accordance with New York Insurance Law § 1213(c)(1)(A), which requires unauthorized foreign or alien insurers, such as Seguros, to post bonds or other security before they are permitted to defend a case on the merits in the New York courts.[1] Because

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1. Section 1213(c)(1) specifically provides:

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with

(Cont'd)

Seguros notified the District Court that it would not post a bond or other security, ACIC filed a motion to strike Seguros's answer, which the District Court granted after a hearing on personal jurisdiction.

After a two-day hearing on damages, the District Court entered a default judgment against Seguros in the amount of $11,801,024.98. On appeal, Seguros argues, as it did before the District Court, that the security requirement of New York Insurance Law § 1213 violates its right to due process.

DISCUSSION

Section 1213 of the New York Insurance Law states that its intended purpose is to

> subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance

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(Cont'd)

> such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or (B) procure a license to do an insurance business in this state.

N.Y. Ins. Law § 1213(c)(1) (McKinney 1985).

> contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such polices.

N.Y. Ins. Law § 1213(a) (McKinney 1985). The statute accomplishes this purpose in two ways: first, by declaring that certain activities on the part of the foreign unauthorized insurer constitute appointment of the New York Superintendent of Insurance as its attorney for service of process, *see* N.Y. Ins. Law § 1213(b)(1), and second, by mandating that out-of-state insurers post security or obtain a license in order to be allowed to participate in court proceedings in New York, *see* N.Y. Ins. Law § 1213(c)(1). Seguros challenges this second requirement here.

I. *Applicability of Section 1213 to Reinsurers*

Initially, we address § 1213's applicability to the circumstances of this case. Seguros argued in the District Court that § 1213 does not apply to reinsurers because "[r]einsurance contracts . . . are merely contracts of indemnity, not policies of insurance." The District Court rejected Seguros's claim, relying on *Morgan v. American Risk Mgmt., Inc.*, No. 89 Civ. 2999, 1990 WL 106837 (S.D.N.Y. July 20, 1990), which in turn relied on the language of another provision of the New York Insurance Law expressly providing that § 1213 applies to those engaged

in reinsurance transactions. *See* N.Y. Ins. Law § 1101(b)(2).[2] Although Seguros does not press this claim on appeal, we find it necessary to address the point, as this status resolution underpins the statute's applicability.

We agree with the court in *Morgan*, and those courts adopting its reasoning, that the argument that a reinsurance contract is not a "policy of insurance" or a "contract of insurance" is not sufficient to contravene the express language of § 1101(b)(2). *See Morgan*, 1990 WL 106837, at *6; *accord, e.g., John Hancock Property and Cas. Ins. Co. v. Universale Reinsurance Co. Ltd.*, 147 F.R.D. 40, 50 (1993) (adopting the reasoning of *Morgan*). Rather, the express language of § 1101(b)(2) demonstrates that "although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, . . . it did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and security requirement." *Morgan*, 1990 WL 106837, at *6.

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2. Section 1101(b)(2) provides in relevant part:

> (2) Notwithstanding [the activities listed in subsection (1) that constitute "doing an insurance business"], the following acts or transactions . . . shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

N.Y. Ins. Law § 1101(b)(2) (McKinney 1985).

Finally, Seguros's argument, advanced in the District Court, that this express language is relevant only to the service of process provisions of subsection 1213(b), is without merit. As the District Court concluded, "it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to the security requirements." *American Centennial Ins. Co. v. Seguros La Republica, S.A.*, Nos. 90 Civ. 2370, 91 Civ. 1235, Report and Recommendation of Magistrate Judge Leonard Bernikow, at 6 (S.D.N.Y. Mar. 23, 1992).

II. *Due Process Challenge*

Seguros contends that the security requirement at issue is equivalent to a prejudgment attachment of its property and, under the test set forth by the Supreme Court in *Connecticut v. Doehr*, 501 U.S. 1 (1991), violates its right to due process. BIIC counters that the security requirement does not constitute an attachment and, in any event, complies with the due process requirements set forth by the Supreme Court for such procedures. We hold that the security requirement of § 1213 is the functional equivalent of an attachment, but that it satisfies the due process requirements of *Doehr*.

The plaintiff's argument that the security requirement is not an attachment is based largely on the New York Court of Appeals's determination that "section 1213(c) does not effect a seizure of property. The foreign or alien insurer is merely required to post security as a precondition of filing an answer in litigation over policies which the insurer has

issued." *Curiale v. Ardra Ins. Co., Ltd.*, 88 N.Y.2d 268, 278 (1996). We respectfully disagree with *Curiale*'s characterization of the security requirement.

First, the Supreme Court has never held that only "complete, physical, or permanent deprivations of real property . . . trigger[ ] due process concern." *Doehr*, 501 U.S. at 12. Rather, its "cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.* Moreover, we have previously characterized § 1213's security requirement as being equivalent to an attachment because "it would force foreign [insurers] to place some of their assets in the hands of the United States courts for an indefinite period. During that time, the [insurers] would have no access to those assets. All this is precisely the same result that would obtain if the foreign [insurer's] assets were formally attached." *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1996). The issue in *Stephens* was whether the provision in the Foreign Sovereign Immunities Act, prohibiting "attachment arrest and execution" of a foreign state's property, 28 U.S.C. § 1609, exempts foreign insurance companies that claim coverage under the FSIA from § 1213's security requirement. While the FSIA is not at issue in the case before us, we believe we are bound by *Stephens*'s characterization of § 1213's security requirement as a prejudgment attachment, especially given the Supreme Court's broad definition in *Doehr* of situations that implicate due process concerns, *see Doehr*, 501 U.S. at 12. Accordingly, analysis of whether § 1213's security requirement comports with due process — an issue not

addressed in *Stephens* — must proceed in light of the conclusion in *Stephens* that this requirement constitutes an "attachment" of the foreign insurance companies' property.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976), articulates the traditional balancing test employed by courts to determine whether a government deprivation of an individual's property violates due process. *See Doehr*, 501 U.S. at 10. The *Mathews* calculus instructs courts to determine the constitutional adequacy of prejudgment attachment procedures by balancing (1) the private interest involved, (2) the risk of an erroneous deprivation of that interest through the procedures utilized, as well as the probable value of additional procedural safeguards, and (3) the government's interest, including the burden that additional procedural requirements would impose. *See Mathews*, 424 U.S. at 325; *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 902 (2d Cir. 1992).

However, as the Supreme Court pointed out in *Doehr*, the balancing test set forth in *Mathews* directly applies only to cases in which "the government itself seeks to effect a deprivation [of property] on its own initiative." 501 U.S. at 10. By contrast, cases analyzing traditional prejudgment remedy statutes require application of a slightly altered balancing test, since they "ordinarily apply to disputes between private parties rather than between an individual and the government." *Doehr*, 501 U.S. at 10-11. In such cases, the first two factors remain the same as under *Mathews*, but the third factor, instead, requires "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interests the

government may have in providing the procedure or forgoing the added burden of providing the greater protections." *Id.* at 11. This alteration is warranted because "any burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other's property." *Id.* As the Court specifically held in *Doehr*, "[t]he State's substantive interest in protecting any rights of the plaintiff cannot be more weighty than those rights themselves." *Id.* at 16. Therefore, in cases where the plaintiff's interest is "*de minimis*," the government's interest will not be significant enough to overcome due process concerns. *Id.*

In the case before us, the District Court held that the security requirement of § 1213 is "readily distinguishable" from "traditional prejudgment creditors' remedies." Similarly, relying largely on *Curiale*, BIIC argues that § 1213 is constitutional because it is distinguishable from traditional prejudgment creditors' remedies that have been held to violate due process in certain cases. *See Curiale*, 88 N.Y.2d at 278. The key distinction, both for the District Court and the court in *Curiale*, lies primarily in the importance of "the State's interest in ensuring the availability of funds from which a judgment against a foreign or alien unlicensed insurer may be promptly paid, instead of requiring claimants to resort to far-flung forums for satisfaction of their judgments," given that "insurers, licensed and unlicensed alike, capitalize on the legitimate expectations of the public that funds to satisfy judgments on insurance policies are readily available within the State." *Curiale*, 88 N.Y.2d at 275, 277; *see also* Jt. App. at 81-82 ("In the creditor's remedies cases the state has no substantial interest to protect

in providing plaintiffs with a prejudgment financial advantage over defendants. The state in the instant case has an interest in protecting its insureds and beneficiaries.") (internal quotation marks and citation omitted).

This conclusion, though correct, requires further explanation. As Seguros points out, under Supreme Court jurisprudence, the government's interest generally is not dispositive in cases where the deprivation of property results from a private individual — rather than the government itself — making use of government procedures. *See Doehr*, 501 U.S. at 10-11. However, Seguros's argument goes too far. *Doehr* does not indicate that the government's interest is inconsequential in cases where a private individual, as opposed to the government, acts. Rather, *Doehr* concludes that the government's interest can be no greater than that of the private litigant seeking attachment. *See Doehr*, 501 U.S. at 16. In *Doehr*, the "plaintiff's interest [was] *de minimis*." *Id.* In the instant case, by contrast, New York State shares with its citizens a significant interest in ensuring that businesses in the heavily regulated insurance industry have sufficient funds within the state where they conduct business to fulfill each individual insurance claim. In short, the State interest at stake in the enactment of § 1213's security requirement is far more substantial than that involved in the enactment and enforcement of traditional prejudgment attachment statutes, because it reflects the collective importance of the regulation to each of its citizens.

Furthermore, § 1213's security requirement passes constitutional muster under the first two prongs of the *Mathews-Doehr* balancing test, as *Curiale* persuasively

makes clear. First, in terms of the private interest involved, § 1213's security requirement, as discussed above, does deprive a foreign insurer of a significant property interest that implicates due process concerns. However, the insurer has an alternative means available to protect its property: it will be excused from the requirement if it obtains a license to do an insurance business in New York. *See* N.Y. Ins. Law § 1213(c)(1)(B). Thus, in reality the security requirement is simply a means of avoiding state licensing requirements, a right the insurer does not have. *See Curiale*, 88 N.Y.2d at 277 ("[T]he ability to conduct insurance business free from legitimate government regulation is not a constitutionally protected property or liberty interest.").

Second, there is little risk of an erroneous deprivation of an insurer's property rights and there are significant additional procedural safeguards. Unlike most prejudgment security statutes, § 1213 is not "available at a plaintiff's option, without any notice to the defendant," but is a "regulatory requirement imposed on all unlicensed foreign and alien insurers" and "mandates court supervision before an insurer may be required to post preanswer security." *Curiale*, 88 N.Y.2d at 278; *see also* § 1213(c)(1)(A). Thus, all insurers subject to § 1213(c) are "provided with notice and an opportunity to be heard before being subjected to the preanswer security requirement." *Curiale*, 88 N.Y.2d at 278; *cf. Doehr*, 501 U.S. at 14-16 (concluding that a prejudgment attachment of real property without prior notice was unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (finding unconstitutional state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk and the posting of a bond);

Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (striking down statute that permitted a creditor to effect prejudgment garnishment of wages without notice to the wage earner or prior hearing).[3]

Finally, though not raised by Seguros, the fact that § 1213 does not require the posting of a security bond by the plaintiff in the event that the attachment ultimately is found to have been erroneously made does not render the statute unconstitutional in this Circuit. We specifically have stated that "because only a plurality of the Justices addressed this issue in *Doehr*, this Circuit has continued to adhere to our previously established position that a security bond need not be posted in connection with a prejudgment attachment in order to satisfy the requirements of due process." *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 402 (2d Cir. 1995).

Accordingly, though we agree with Seguros that the security requirement of § 1213 is properly characterized as

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3. We need not reach the issue of whether, absent notice and court supervision, § 1213 would violate due process. We note, however, that BIIC's essential claim — that Seguros owes it a sum of money under a set of contracts — appears to fall into the category of cases cited in *Doehr* as "lend[ing] themselves to accurate *ex parte* assessments of the merits," since they "concern ordinarily uncomplicated matters that lend themselves to documentary proof." 501 U.S. at 14, 17 (internal quotations omitted); *see also Shaumyan v. O'Neill*, 987 F.2d 122, 126-27 (2d Cir. 1993) (upholding a Connecticut statute permitting ex parte prejudgment attachment of a home in part because it involved "an outstanding sum certain due under [a] contract").

a prejudgment attachment, we conclude that it comports with due process.

CONCLUSION

For the foregoing reasons, we affirm the District Court's order deciding that there was no due process violation in applying the security requirement of New York Insurance Law to Seguros.

APPENDIX B — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED MAY 4, 2000

UNITED STATES COURT OF APPEALS — FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May, two thousand.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. CHESTER J. STRAUB,
HON. ROSEMARY S. POOLER,
Circuit Judges.

No. 99-7721

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Plaintiff-Appellee,

v.

SEGUROS LA REPUBLICA, S.A.,

Defendant-Appellant.

Appendix B

SUMMARY ORDER

* * *

Appeal from the United States District Court for the Southern District of New York (John F. Keenan, *Judge*).

AFTER SUBMISSION AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED in part and VACATED and REMANDED in part.

This case arises out of Defendant-Appellant Seguros La Republica, S.A.'s ("Seguros") alleged failure to pay a predecessor-in-interest of British International Insurance Co. ("BIIC"), American Centennial Insurance Company ("ACIC"), pursuant to twenty-six reinsurance certificates. During the course of the litigation, ACIC moved for an order compelling Seguros to post pre-answer security in accordance with New York Insurance Law § 1213, which requires unauthorized foreign or alien insurers, such as Seguros, to post bonds or other security before they are permitted to defend a case on the merits in the New York courts. *See* N.Y. Ins. Law § 1213(c)(1)(A) (McKinney 1985). Because Seguros notified the court that it would not post a bond or other security, ACIC filed a motion to strike Seguros's answer, which the District Court granted after a hearing on personal jurisdiction. After a two-day hearing on damages, the District Court entered a default judgment against Seguros in the amount of $11,801,024.98. On appeal, Seguros argues, as it did before the District Court, that

(1) the security requirement of New York Insurance Law § 1213 violates Seguros's right to due process; (2) that service of process in this action was not in accordance with Mexican law; (3) that the District Court did not have personal jurisdiction over Seguros; and (4) that the plaintiff failed to adequately prove the damages awarded.

In a separate published opinion filed simultaneously with this order, we consider and reject Seguros's claim that § 1213's security requirement violates its right to due process. In this summary order, we dispose of Seguros's remaining arguments, and we affirm the District Court's decisions on those issues, with the exception of two damages-related items noted below, for substantially the reasons outlined in the opinions of the District Court. *See American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370 (S.D.N.Y. Apr. 8, 1991) (denying, *inter alia*, Seguros's motion for an order quashing service of process because service was done in accordance with the law of Mexico and, therefore, in accordance with Fed. R. Civ. P. 4(i)(1)(A)); *American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370, 1995 WL 731630 (S.D.N.Y. Dec. 8, 1995) (agreeing, upon *de novo* review of evidence presented at a three-day hearing, with the recommendation of the Magistrate Judge that the District Court had personal jurisdiction over Seguros); *American Centennial Insur. Co. v. Seguros La Republica*, No. 90 Civ. 2370 (S.D.N.Y. May 10, 1999) (adopting the Magistrate Judge's recommended ruling of October 30, 1998, establishing the amount of damages after a two-day hearing).

Appendix B

As to whether ACIC is entitled to reimbursement from Seguros for legal expenses spent in declaratory judgment actions, we remand. ACIC's complaint seeks reimbursement for losses and expenses paid "[p]ursuant to the insurance policies . . . to, or on behalf of its insureds." Seguros argues that the amounts spent in seeking declaratory relief were for ACIC's own expenses in opposing coverage for its insureds, as opposed to expenses paid to its insureds and, therefore, are not covered under the policies or requested relief in the complaint. This issue presents a pure question of law, the determination of which is not waived by the default. *See Alexander & Alexander v. These Certain Underwriters at Lloyd's, London*, 136 F.3d 82, 86 (2d Cir. 1998) ("Under New York law 'the initial interpretation of a contract is a matter of law for the court to decide.' "). Accordingly, we remand to the District Court to determine whether the policies covered the declaratory judgment expenses and whether the complaint adequately requested this relief.

In addition, Seguros contends that ACIC failed to present any proof of $52,987.22 of the $910,630.46 that ACIC claimed to have paid to its insureds. ACIC does not address this claim in its brief on appeal, and it is not clear how the District Court resolved this issue. Therefore, we remand to the District Court to determine whether the record supports Seguros's assertion that no proof was offered as to $52,987.22 in claims paid by AIIC, if in fact Seguros raised that argument below.

Appendix B

Accordingly, the judgment of the District Court is affirmed in part and vacated and remanded in part.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk

s/ Lucille Carr — 5/4/00
By: — Date

APPENDIX C — DEFAULT JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED MAY 17, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 CIV 2370 (JFK)

BRITISH INTERNATIONAL INSURANCE CO., LTD.,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

DEFAULT JUDGMENT

Whereas the above entitled action having been brought before this Court and the matter having been assigned to the Honorable John F. Keenan, United States District Judge, and the matter of an inquest for damages having been referred to the Honorable Leonard Bernikow, United States Magistrate Judge, who on October 30, 1998 having issued his Report and Recommendation, and the Court, on May 10, 1999 having issued its Opinion (82329) and Order adopting the Report of the Magistrate Judge in its entirety and directing the Clerk to enter a default judgment in favor of BIIC in the amount of $11,251,696.35 with interest on this amount from October 30, 1998 till date of judgment amounting to $549,328.63, for a judgment totaling $11,801,024.98, it is,

Appendix C

ORDERED, ADJUDGED, AND DECREED, That pursuant to the Court's Opinion (82329) and Order dated May 10, 1999, the Report and Recommendation of Magistrate Judge Bernikow dated October 30, 1999 is adopted in its entirety, and a default judgment is hereby entered in favor of BIIC in the amount of $11,251,696.35 plus interest at 9% from October 30, 1999 until the date of this judgment, amounting to $549,328.63, for a total default judgment of $11,801,024.98; furthermore, "by virtue of Defendant's default in this matter, the Court declares that Defendant is obligated to pay any amounts billed by Plaintiff in the future arising out of the facultative certificates listed in Exhibit B to the Court's Order and Opinion dated May 10, 1999, it is further,

ORDERED: That this case is closed and the Clerk is directed to remove this case from the Court's docket.

DATED: New York, NY
May 17, 1999

JAMES M PARKISON
Clerk

By: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 18, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INS. CO.,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

ORDER

JOHN F. KEENAN, United States District Judge:

Defendant Seguros La Republica, S.A. ("Seguros") has filed Rule 72 objections to Magistrate Judge Bernikow's May 4, 1993 Report and Recommendation that Plaintiff's motion to strike La Seguros's answer and for entry of a default judgment be granted.

Briefly, the procedural history of this case is as follows: Seguros, a foreign insurer, filed a motion to dismiss for lack of personal jurisdiction. This Court denied the motion after finding that Plaintiff had made a prima facie showing of

jurisdiction over Seguros. *See* Opinion and Order, 90 Civ. 2370 (JFK), dated April 8, 1991. After Seguros had filed its answer, Plaintiff moved for pre-answer security. On June 16, 1992, this Court adopted Magistrate Judge Bernikow's report and recommendation and directed Seguros to post security of $5.7 million to secure payment of any judgment that may be entered in this case or in an action pending before Judge Lowe, *American Centennial Insurance Co. v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

In July 1992, Seguros's counsel advised Magistrate Judge Bernikow that Seguros would not be posting the security. In December 1992, Plaintiff filed a motion to strike Seguros's answer and to enter default judgment. Magistrate Judge Bernikow issued a Report and Recommendation on May 4, 1993, recommending that the answer be stricken and default be entered after a hearing on damages. Seguros now objects to the Report on the following grounds: (1) Magistrate Bernikow should have granted it discovery; (2) section 1213 does not apply to reinsurance transactions; (3) application of section 1213 in this action is unconstitutional.

As to the first objection, the Court finds that Magistrate Judge Bernikow's ruling on discovery was neither clearly erroneous nor contrary to law. He found that the discovery Seguros seeks is "irrelevant" in essence because by defaulting, Seguros "conceded . . . all well-pleaded allegations of liability" and "has effectively conceded the propriety of the payments it would question." Report at 7. Accordingly, Magistrate Judge Bernikow's discovery ruling is affirmed.

Appendix D

As to the second objection, this Court has already held that section 1213 applies to the case at bar. *See American Centennial Insurance Co. v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK), dated June 16, 1992. As Magistrate Judge Bernikow noted, this is the law of the case, and the objection is therefore overruled.

Seguros's third objection is that entering a default and awarding damages before an evidentiary hearing has been held on Seguros's personal-jurisdiction defense would deprive Seguros of due process. The Court notes that any judgment rendered by a court lacking either personal or subject matter jurisdiction is void from its inception. Accordingly, while the Court has already held that Plaintiff has made a prima facie showing of jurisdiction, Plaintiff must still prove by a preponderance of the evidence that there is personal jurisdiction over Defendant, whether in this court or in the court in which it will ultimately seek enforcement of the judgment. Efficiency dictates that the issue be resolved now, rather than on a collateral attack.

For this reason, the Court refers this matter to Magistrate Bernikow for an evidentiary hearing on the issue of personal jurisdiction. If personal jurisdiction is found, the hearing on damages may be held immediately, within the parameters set forth in the Report and Recommendation.

For the foregoing reasons, the Report and Recommendation is adopted with a direction that a hearing on personal jurisdiction be held before the hearing on damages.

Appendix D

SO ORDERED.

Dated: New York, New York
August 18, 1993

s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 16, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

MEMORANDUM OPINION AND ORDER

JOHN F. KEENAN, United States District Judge

Before the Court are the objections of Defendant, Seguros La Republica, S.A. ("Seguros"), to Magistrate Judge Bernikow's Report and Recommendation dated March 23, 1992.[1] *See* Fed. R. Civ. P. 72(a). Plaintiff, American

1. This Court had referred the pretrial proceedings in this case to Judge Bernikow. Accordingly, Plaintiff's motion was before Judge Bernikow for hearing and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). This opinion relates only to the action before this Court, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK) and not to the action before Judge Mary Johnson Lowe, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

Centennial Insurance Company ("ACIC"), moved to compel Seguros to deposit or file pre-answer security pursuant to New York Insurance Law § 1213(c)(1)(A). Plaintiff also moved to strike Seguros' answer in the event that Plaintiff's § 1213 motion was granted and Defendant failed to post security. Judge Bernikow recommended that ACIC's motion be granted in part and denied in part.

Defendant Seguros now raises two objections to Judge Bernikow's Report and Recommendation. First, Seguros contends that § 1213 of the New York Insurance Law does not apply to reinsurance disputes or transactions. Judge Bernikow addressed precisely this issue and found that although the business of reinsurance is to be distinguished from the business of insurance for some purposes, the New York State legislature did not intend to exempt unauthorized reinsurers from the § 1213(c)(1)(A) security requirement. *See American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 2370 (JFK), Report and Recommendation (Magistrate Judge Bernikow), Mar. 23, 1992, at 4-5; *Morgan v. American Risk Management, Inc.*, No. 89 Civ. 2999 (JSM) (KAR), 1990 WL 106837 at *3, 6 (S.D.N.Y. July 20, 1990). This Court is persuaded by Judge Bernikow's reasoning and therefore finds Seguros' first objection to be without merit.

Second, Seguros asserts that an order requiring the defendant to post pre-answer security at this stage of the proceeding would constitute a taking without due process. *See* Defendant's Objection To Magistrate Judge's Report And Recommendation That Defendant Be Directed to Post Pre-Answer Security ("Def. Mem."), at 2-3. In support of

this contention, Seguros relies on *Connecticut v. Doehr*, 111 S. Ct. 2105 (1990), in which the Supreme Court clarified the constitutional analysis to be applied to prejudgment attachment statutes. As Judge Bernikow noted in his Report, *Doehr* is readily distinguishable from the instant case. *See* Report and Recommendation at 9-10. Accordingly, this Court rejects Seguros' second objection.

After careful review of Magistrate Judge Bernikow's Report, this Court finds no portion of the Report and Recommendation to be clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a). This Court therefore adopts the Report and Recommendation in its entirety. ACIC's motion to direct Seguros to post security is granted. ACIC's motion to strike the answer upon Seguros' failure to post security is denied as premature and without prejudice.

This Court also adopts Judge Bernikow's Supplemental Report and Recommendation dated April 13, 1992. Seguros is directed to deposit with the Clerk of the Court cash or securities or a surety bond in the amount of Five Million Seven Hundred Thousand Dollars ($5,700,000) to secure payment of any final judgment that may be rendered in this action or in the action pending before Judge Mary Johnson Lowe, *American Centennial Insurance Company v. Seguros La Republica, S.A.*, 90 Civ. 1235 (MJL).

Appendix E

SO ORDERED.

Dated: New York, New York
June 16, 1992

s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 13, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK) (LB)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,
a foreign corporation,

Defendant.

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91 Civ. 1235 (MJL) (LB)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Petitioner,

– against –

SEGUROS LA REPUBLICA, S.A.,
a foreign corporation,

Respondent.

Appendix F

REPORT AND RECOMMENDATION

Plaintiff/Petitioner American Centennial Insurance Company ("ACIC"), having moved for an Order compelling Defendant/Respondent Seguros La Republica, S.A. ("Seguros") to deposit or file with the Clerk of the Court security pursuant to New York Insurance Law Section 1213(c)(1)(A), and the Court having previously recommended, in a Report and Recommendation dated March 23, 1992, that "ACIC's motion be granted to the extent of directing Seguros to post security," and the Court having heard the arguments of counsel regarding the proper amount of security, and after due deliberation, I recommend that Seguros be directed to deposit with the Clerk of this Court cash or securities, or file with the Clerk of this Court a bond with good and sufficient sureties, in the amount of Five Million Seven Hundred Thousand ($5,700,000.00) Dollars to secure payment of any final judgment which may be rendered in the captioned proceedings.

Dated: April 13, 1992

s/ Leonard Bernikow
Leonard Bernikow,
Magistrate Judge

APPENDIX G — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 23, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 2370 (JFK)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Plaintiff,

– against –

SEGUROS LA REPUBLICA, S.A.,

Defendant.

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91 Civ. 1235 (MJL)

AMERICAN CENTENNIAL INSURANCE COMPANY,

Petitioner,

– against –

SEGUROS LA REPUBLICA, S.A.,

Respondent.

Appendix G

REPORT AND RECOMMENDATION

TO THE HONORABLE JOHN F. KEENAN, U.S.D.J.:
TO THE HONORABLE MARY JOHNSON LOWE, U.S.D.J.:

Plaintiff American Centennial Insurance Company ("ACIC") moves in both actions to compel defendant Seguros La Republica, S.A. ("Seguros") to deposit or file pre-answer security pursuant to New York Insurance Law § 1213(c)(1)(A) and to strike Seguros's answers in the event it does not comply with that statute. The motions were referred to me to hear and report. *See* 28 U.S.C. § 636(b)(1)(B).

Background

a. The Keenan action

The facts of this case are set forth in Judge Keenan's Opinion and Order, dated April 8, 1991, which denied Seguros's motion to dismiss the complaint for lack of personal jurisdiction. In brief, plaintiff in this diversity action seeks to recover more than $6,400,000 allegedly due under several certificates of facultative reinsurance issued by Seguros to reimburse ACIC for its share of losses and expenses incurred by ACIC pursuant to underlying insurance policies.[1] Seguros

1. The complaint demands judgment in the sum of $3,475,647.27, the amount of paid recoverables due ACIC at the time it commenced this action. The complaint also seeks judgment declaring that Seguros is obligated to pay amounts that come due (Cont'd)

is a foreign corporation existing under the laws of Mexico and in the business of insurance and reinsurance. ACIC is a Delaware corporation licensed to do business in New York.

b. The Lowe action

This report also concerns a diversity action before Judge Lowe in which plaintiff seeks to confirm a Final Arbitration Award rendered in an arbitration between ACIC and Seguros. ACIC contends that the award was issued after Seguros failed and refused to pay amounts due to ACIC under a Quota Share Retrocession Agreement for Excess Facultative Reinsurance Business. Under the terms of the arbitration award, as of March 31, 1991, Seguros owes $1,031,411.35 to ACIC.

Discussion

a. Insurance vs. reinsurance

ACIC contends that Seguros has failed to comply with N.Y. Insurance Law § 1213(c)(1)(A).[2] Section 1213(c)(1)(a)

(Cont'd)
under the facultative certificates in the future when and as billed. As of March 31, 1991, ACIC contends, Seguros's share of paid recoverables was $6,414,181.25. And that amount is subject to revision as ACIC pays additional claims.

2. Section 1213(c)(1) (McKinney 1985) provides:

> (c)(1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (Cont'd)

requires a foreign or alien insurer before filing any pleading in a proceeding against it to file a bond with the court. The purpose of the security deposit "is to ensure that the defendant insurer, if it 'defends and is unsuccessful, . . . will be able to satisfy the judgment.' " *T.P.K. Construction Corp. v. Southern American Ins. Co.*, 739 F. Supp. 213, 216 (S.D.N.Y. 1990) (quoting *Arnold Chait, Ltd. v. La Metropolitana, Compania Nacional de Seguros, S.A.*, 26 Misc. 2d 751, 207 N.Y.S. 22, 24 (N.Y. Sup. Ct. 1960); *see also Morgan v. American Risk Management, Inc.*, No. 89 Civ. 2999 (JSM) (KAR) 1190 WL 106837 *5 (S.D.N.Y. July 20, 1990). Seguros argues that § 1213(c)(1) does not apply to either of the two cases because the Keenan action involves a reinsurance contract and the Lowe action involves a proceeding to confirm an arbitration award.

(Cont'd)

> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in this state.

Seguros argues that § 1213 applies to insurance policies — not to reinsurance policies.[3] Reinsurance contracts, says Seguros, are merely contracts of indemnity, not policies of insurance. The same argument was made and rejected in *American* insurance. The same argument was made and rejected in *American Risk Management*, 1990 WL 106837 at *3.[4] The court there stated, "[w]hile a reinsurance treaty is arguably not a 'policy of insurance' or even a 'contract of insurance,' the contention that the legislature therefore did not intend § 1213 to apply to reinsurance must be rejected in light of the express language of [Insurance Law]

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3. Seguros points out that cases have recognized that reinsurance agreements are distinct from contracts insuring against liability. *E.g.*, *Liberty Mutual Ins. Co. v. Gibbs*, 773 F.2d 15, 18 (1st Cir. 1985); *Security Mutual Casualty Co. v. Century Casualty Co.*, 531 F.2d 974, 977 (10th Cir.), *cert. denied*, 429 U.S. 860 (1975). This distinction appears to focus on the fact that the reinsurer's liability is conditioned upon the insurer's prior payment of loss. *American Risk Management*, 1990 WL 106837 at *6 n. 8 (citing *Skandia American Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 724 (S.D.N.Y. 1977)). Thus, "the insured is not considered a third-party beneficiary of the reinsurance treaty, and cannot recover against the reinsurer, even if the insurer becomes insolvent." *Id.* But the cases cited by Seguros have nothing to do with a foreign insurer's duty to file pre-answer security, as required by state law. *See id.* at *6.

4. This argument was also tacitly rejected in *Curiale v. Ardra Insurance Co.*, No. 9794/85 (Sup. N.Y. Co. May 2, 1991), Exh. F to Cohen Aff. There, the defendant argued that § 1213 did not apply to reinsurers because the statute is a sort of consumer protection statute. Although the court did not discuss the issue, it issued an order granting the plaintiff's motion to strike the answer unless the defendant posted security.

§ 1101(b)(2)(G)." *Id.* 1990 WL 106837 at *6 (footnote omitted). Section 1101(b)(2)(G) (McKinney 1985) provides:

> (2) Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:
>
> * * *
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

"Thus, although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, it appears that it did not intend that the unauthorized reinsurers be exempted from New York's long-arm statute and security requirement." *American Risk Management*, 1990 WL 106837 at *6.

Nonetheless, Seguros argues that § 1101 merely addresses the issue of what constitutes "doing an insurance business" in New York and, therefore, is relevant only to the "doing business" provisions of subsection (b) of § 1213 regarding service of process. Section 1101 is not applicable, Seguros continues, to the pre-answer security provisions of

subsection (c) of § 1213, which does not refer to or define the concept of doing business. Seguros cites no authority for its argument. The court in *American Risk Management* did not distinguish between subsection (b) and (c) of § 1213 in relying on § 1101. As noted, the court there expressly stated that the legislature apparently did not intend to exempt reinsurers from the long arm statute or the security requirement of § 1213. Additionally, as ACIC argues, it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to the security requirements.

Seguros also argues that even if § 1213 applies to reinsurance transactions, it does not apply to the transactions at issue because § 1101(b)(2) applies only to reinsurance transactions "effected by mail from outside [New York]." ACIC alleges in paragraph 2 of the complaint that the reinsurance transactions between ACIC and CJV were effected in person from inside of New York by CJV. Section 1101(b)(2) does not appear to mean that § 1213 applies only to acts and transactions effected by mail from outside of New York. Rather, as ACIC argues, the section means that even where the acts of the alien insurer falls short of the "doing an insurance business" standard, such as by effecting a transaction by mail outside of the state, § 1213 shall nevertheless be applicable. Moreover, as ACIC again argues, reading the statute in the way Seguros urges leads to an absurd result: alien insurers transacting business in New York through the mails would be subject to the security requirement, yet such insurers transacting business through an agent would not. Finally, in *American Risk Management*, 1990 WL 106837 at *7, and *Aero Associates v.*

La Metropolitana, 183 F. Supp. 357, 359 (S.D.N.Y. 1960), involving agreements executed and delivered in New York and alien insurers, the court found the statute or its predecessor applicable.[5] In short, applying the holding of *American Risk Management* to the instant case, I find that § 1213 applies to reinsurers.

b. Arbitration

Seguros argues that section 2312 does not apply to the Lowe action because that action involves a petition to confirm an arbitration award under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The Lowe action is not, Seguros adds, a suit by or on behalf of an insured under an insurance contract or a reinsurance contract within the meaning of Section 1213.[6] The arbitration, however, arose out of a reinsurance contract. The petition to confirm results from ACIC's efforts to enforce that contract. This reading of § 1213 does not undermine the purpose of the statute. But more than that, Section 1213(c)(1)(A) requires the posting of security before an "alien insurer files any pleading in a proceeding against it." This action is a proceeding against an alien insurer. Thus, by its terms, § 1213 applies to the Lowe action.

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5. *La Metropolitana* did not involve the security requirement. It dealt with the predecessor statute's provision designating the superintendent of insurance as the alien insurer's attorney upon whom process may be served.

6. I assume Seguros refers to the first sentence of § 1213(a) for its contention.

c. Due Process

Seguros next argues that § 1213, as applied to this case, deprives it of due process because the statute requires it to post security before its jurisdictional defense is adjudicated. Seguros argues that if it has to post pre-answer security before being permitted to avail itself of the judicial process, it will suffer both temporary and permanent deprivation of property. In addition, Seguros says, there are genuine fact issues concerning whether there is a contractual basis to support ACIC's claims.

In his opinion denying Seguros's motion to dismiss for lack of personal jurisdiction, Judge Keenan found that ACIC made a *prima facie* showing of jurisdiction, slip op. at 14, all that was necessary at the pre-discovery stage. *Ball v. Metallugie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.), *cert. denied*, 111 S.Ct. 150 (1990). Furthermore, Judge Keenan stated that his finding did not violate the constitutional standards for assertion of jurisdiction over a foreign defendant. Slip op. at 15.

Moreover, § 1213's predecessor has been found constitutional when faced with due process and equal protection challenges. *Ace Grain Co. v. Amerian Eagle Fire Ins. Co.*, 95 F.Supp. 784, 787 (S.D.N.Y. 1951). In addition, California's equivalent to § 1213 has also been found constitutional. *Triherdron Int'l Assurance, Ltd. v. Superior Court*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (4th Dist. 1990). In California, the court found the statute "a proper

exercise of the state's police power to regulate the transaction of insurance."[7] *Id.* 218 Cal. App.3d at 939.

Nevertheless, Seguros cites cases concerning traditional prejudgment creditors' remedies: *e.g.*, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Connecticut v. Doehr*, 111 S. Ct. 2105 (1990). These cases are readily distinguishable from the instant cases. *Trihedron*, 218 Cal. App.3d at 947. "In the creditor's remedies cases the state has no substantial interest to protect in providing plaintiffs with a prejudgment financial advantage over defendants." *Id.* The state in the instant case has an interest in protecting its insureds and beneficiaries. *See Id.* Thus, the due process claim should be rejected.

d. Documentation

Seguros also contends that ACIC's claim for reimbursement is not substantiated by sufficient

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7. The California statute, Insurance Code § 1616, provides in pertinent part:

> Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action . . . instituted against it, the insurer shall either (1) procure a certificate of authority to transact insurance in this state; or (2) give a bond in the action . . . in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action, . . .

Trihedron, 218 Cal. App.3d at 940 n.2.

documentation. For example, Seguros notes that ACIC does not have the originals or copies of thirteen underlying insurance policies for claims relating to thirteen facultative certificates for which plaintiff seeks $556,014.44. Nonetheless, the merits of the case have no bearing on the posting of security. *American Risk Management*, 1990 WL 106837 at *8.[8] If Seguros's position were accepted, a plaintiff would have to prove its case before a defendant answered.

e. Mexican Law

Seguros has also submitted the affidavit of its Director of Administration, which states that in order to procure a bond in the amount requested, Seguros would have to pledge its assets in the amount of the value of the bond.[9] According to Mexican law, the affidavit says, an insurance institution such an Seguros is prohibited from pledging its properties and, hence, even if ordered to post a bond, Seguros could not comply. Seguros also notes, in the affidavit, that at present insurance authorities in Mexico prohibit the transfer of any funds outside of Mexico.

In response, ACIC has submitted the affidavit of a practicing attorney in Mexico that disputes Seguros's affidavit. In that attorney's opinion there is no legal prohibition under Mexican law preventing Seguros from posting a bond in New York issued by a Mexican or

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8. A merits argument was also unsuccessfully raised in *Trihedron*, 218 Cal. App.3d at 946 & n.9.

9. The affidavit does not indicate that the affiant is an attorney.

U.S. bonding company. In any event, the laws of Mexico concerning the posting of a bond have no relevance to the obligation of a foreign insurer under § 1213.

Conclusion

For the reasons stated, I recommend that ACIC's motion be granted to the extent of directing Seguros to post security. As noted, ACIC also requests that upon Seguros's failure to do so that the answer be stricken. That kind of relief at this time is premature and, accordingly, I recommend that this part of the motion be denied without prejudice. As for the amount of the bond, the parties should attempt to agree. If they cannot, they should schedule a conference before me.

Copies of this report have been mailed this date to the parties listed below, who are hereby advised of their right to file objections to this report with Judge Lowe and Judge Keenan on or before April 9, 1992. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e). Failure to object to this report by that date will preclude appellate review. *Small v. Secretary*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated: New York, New York
March 23, 1992

Respectfully submitted,

s/ Leonard Bernikow
LEONARD BERNIKOW
United States Magistrate Judge

APPENDIX H — RELEVANT STATUTES

New York Insurance Law § 1101(b)(2), (b)(2)(G)

§ 1101. Definitions; doing an insurance business

* * *

(b)(2) Notwithstanding the foregoing, the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but section one thousand two hundred thirteen of this chapter shall nevertheless be applicable to such insurers:

* * *

> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter;

* * *

New York Insurance Law § 1102(a)

§ 1102. Insurer's license required; issuance

(a) No person, firm, association, corporation or joint-stock company shall do an insurance business in this state unless authorized by a license in force pursuant to the provisions of this chapter, or exempted by the provisions of this chapter from such requirement. Any person, firm,

association, corporation or joint-stock company which transacts any insurance business in this state while not authorized to do so by a license issued and in force pursuant to this chapter, or exempted by this chapter from the requirement of having such license, shall, in addition to any other penalty provided by law, forfeit to the people of this state the sum of one thousand dollars for the first violation and two thousand five hundred dollars for each subsequent violation.

* * *

New York Insurance Law § 1213

§ 1213. Service of process on superintendent as attorney for unauthorized insurers

(a) The purpose of this section is to subject certain insurers to the jurisdiction of the courts of this state in suits by or on behalf of insureds or beneficiaries under certain insurance contracts. The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such state interest, the legislature herein provides a method of substituted service of process upon such insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this section, what constitutes doing business in this state, and also exercises

powers and privileges available to the state by virtue of public law number fifteen, seventy-ninth congress of the United States, chapter twenty, first session, senate number three hundred forty, as amended, (15 U.S.C. § 1011) which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

(b)(1) Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer:

> (A) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein,
>
> (B) the solicitation of applications for such contracts,
>
> (C) the collection of premiums, membership fees, assessments or other considerations for such contracts, or
>
> (D) any other transaction of business,

is equivalent to and constitutes its appointment of the superintendent, and his successors in office, to be its true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of

insurance, and shall signify its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

(2) Such service of process upon any such insurer in any such proceeding in any court of competent jurisdiction of this state may be made by serving the superintendent, any deputy superintendent or any salaried employee of the department whom the superintendent designates for such purpose with two copies thereof and the payment to him of a fee of twenty dollars. The superintendent shall forward a copy of such process by registered or certified mail to the defendant at its last known principal place of business, as designated by the issuer of such process, and shall keep a record of all process so served upon him. Such service of process under this paragraph is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by or on behalf of the plaintiff to the defendant at its last known principal place of business by registered or certified mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court if there be no clerk, an affidavit of compliance herewith, a copy of the process, and either a return receipt purporting to be signed by the defendant or a person qualified to receive its registered or certified mail in accordance with the rules and customs of the post

office department, or, if acceptance was refused by the defendant or its agent, the original envelope bearing a notation by the postal authorities that receipt was refused. Service of process so made shall be deemed made within the territorial jurisdiction of any court in this state.

(3) Service of process in any such proceeding shall in addition to the manner provided in paragraph two of this subsection be valid if served upon any person within this state who, in this state on behalf of such insurer, is:

(A) soliciting insurance;

(B) making, issuing or delivering any contract of insurance; or

(C) collecting or receiving any premium, membership fee, assessment or other consideration for insurance;

provided notice of such service and a copy of such process are sent within ten days thereafter, by or on behalf of the plaintiff to the defendant at the last known principal place of business of the defendant, by registered mail with return receipt requested. The plaintiff shall file with the clerk of the court in which the action is pending, or with the judge or justice of such court in case there be no clerk, an affidavit of compliance herewith, a copy of the process, and either a return receipt

purporting to be signed by the defendant or a person qualified to receive its registered mail in accordance with the rules and customs of the post office department; or, if acceptance was refused by the defendant or its agent the original envelope bearing a notation by the postal authorities that receipt was refused.

(4) The papers referred to in paragraphs two and three of this subsection shall be filed within thirty days after the return receipt or other official proof of delivery, or the original envelope bearing a notation of refusal, is received by the plaintiff. Service of process shall be complete when such process and the accompanying papers are filed pursuant to this section.

(5) Nothing contained in this section shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner permitted by law.

(c)(1) Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:

(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of

any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or

(B) procure a license to do an insurance business in this state.

(2) The court in any proceeding wherein service is made pursuant to paragraph two or three of subsection (b) of this section may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of paragraph one of this subsection and to defend such proceeding.

(3) Nothing in paragraph one of this subsection is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to set aside service made in the manner provided in paragraph two or three of subsection (b) hereof on the ground (i) that such unauthorized insurer has not done any act enumerated in paragraph one of subsection (b) of this section, or (ii) that the person on whom service was made

pursuant to paragraph three of subsection (b) hereof was not doing any act therein enumerated.

(d) In any action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty days after demand prior to the commencement of the action to make payment pursuant to the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow plaintiff a reasonable attorney's fee and include such fee in any judgment rendered in such action. Such fee shall not exceed twelve and one-half percent of the amount the court finds the plaintiff is entitled to recover against the insurer nor be less than twenty-five dollars. Failure of an insurer to defend any such action shall be prima facie evidence that its failure to pay was vexatious and without reasonable cause.

(e) This section shall not apply to any proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effectuated in accordance with subsection (b) or (c) of section two thousand one hundred seventeen of this chapter or in accordance with section two thousand one hundred five of this chapter where such contract designates the superintendent or his successors in office the insurer's true and lawful attorney upon whom may be served all lawful process in any proceeding instituted by or on behalf of an insured or beneficiary arising out of such contract.

(f) The superintendent shall keep a record of each process served upon him under this section and pursuant to

section one thousand two hundred twelve of this article, including the date of service. He shall, upon request made within ten years of such service, issue a certificate under his seal certifying as to the receipt of the process by an authorized person, the date and place of service and the receipt of the statutory fee. Process served upon the superintendent pursuant to this section or section one thousand two hundred twelve of this article shall be destroyed by him after a period of ten years from such service.

* * *

New York Insurance Law § 1301(a), (a)(14)

§ 1301. Admitted assets

(a) In determining the financial condition of a domestic or foreign insurer or the United States branch of an alien insurer for the purposes of this chapter, there may be allowed as admitted assets of such insurer, unless otherwise specifically provided in this chapter, only the following assets owned by such insurer:

* * *

(14) Reinsurance recoverable by a ceding insurer: (i) from an insurer authorized to transact such business in this state, except from a captive insurance company licensed pursuant to the provisions of article seventy of this chapter, in the full amount thereof; (ii) from an accredited reinsurer, as defined in subsection (a) of section

one hundred seven of this chapter, to the extent allowed by the superintendent on the basis of the insurer's compliance with the conditions of any applicable regulation; or (iii) from an insurer not so authorized or accredited or from a captive insurance company licensed pursuant to the provisions of article seventy of this chapter, in an amount not exceeding the liabilities carried by the ceding insurer for amounts withheld under a reinsurance treaty with such unauthorized insurer or captive insurance company licensed pursuant to the provisions of article seventy of this chapter as security for the payment of obligations thereunder if such funds are held subject to withdrawal by, and under the control of, the ceding insurer. Notwithstanding any other provision of this chapter, the superintendent may by regulation prescribe the conditions under which a ceding insurer may be allowed credit, as an asset or as a deduction from loss and unearned premium reserves, for reinsurance recoverable from an accredited reinsurer , an insurer not authorized in this state or a captive insurance company licensed pursuant to the provisions of article seventy of this chapter.

* * *

Appendix H

New York Insurance Law § 4104

§ 4104. Deposits

(a) Before being licensed to write one or more of the kinds of insurance defined respectively in the following paragraphs of subsection (a) of section one thousand one hundred thirteen of this chapter: burglary and theft (7), glass (8), boiler and machinery (9), elevator (10), animal (11), personal injury liability (13), property damage liability (14), workers' compensation and employers' liability (15), fidelity and surety (16), or credit (17), a domestic property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least five hundred thousand dollars or the amount required as paid-in capital or minimum surplus for the kind or kinds of insurance which such company is to be licensed to write, whichever is the lesser, but in no event shall the amount of the deposit be less than four hundred thousand dollars for any stock company writing any two kinds of insurance designated in this subsection.

(b) Before being licensed pursuant to subsection (c) of section four thousand one hundred two of this article to reinsure risks or to write insurance on risks outside of the United States, its territories and possessions, a domestic property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least three million dollars. Such deposit shall be inclusive of any deposit required by subsection (a) or (c) hereof.

(c) Before being authorized to issue non-assessable policies pursuant to section four thousand one hundred thirteen of this article, a domestic mutual property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount of at least five hundred thousand dollars. Such deposit shall be inclusive of any deposit required by subsection (a) or (b) hereof.

(d) Before being granted any license or renewal license, every foreign property/casualty insurance company shall have made a deposit with the superintendent of eligible securities in an amount not less than the amount required for a similar domestic property/casualty insurance company. The superintendent shall accept in lieu of such deposit a certificate of the proper state officer of the state under whose laws such company is organized showing that such company has deposited with the proper officer of such state, in trust for the benefit and protection of, or for the security of, all of its policyholders, or of all of its policyholders and creditors, securities valued at an amount not less than the amount hereinbefore specified. Such certificate and deposit shall be governed by the provisions of sections one thousand three hundred eighteen and one thousand three hundred nineteen of this chapter.

(e) The dollar amounts of the deposits specified in subsections (a) and (c) hereof shall be reduced by fifty percent for any property/casualty insurance company initially licensed to do business in this state prior to July first, nineteen hundred eighty-two.

* * * *

(2)

No. 00-200

Supreme Court, U.S.
FILED
OCT 18
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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82 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Insurance Law § 1213 requiring an alien unauthorized reinsurance company, which incurred an indebtedness while doing business in New York, to either: (i) obtain a license to do business in New York; or (ii) deposit a bond or cash requirements, after notice and hearing before defending an action to recover that indebtedness in New York, violates the Fourteenth Amendment's Due Process Clause?

STATEMENT PURSUANT TO RULE 29.6

Respondent British International Insurance Company's interests in this case were assigned to British Insurance Company of Cayman ("BICC") during the pendency of this action. BICC is wholly-owned by White Mountains Insurance Group, Ltd. ("White Mountains"). White Mountains' stock is publicly traded on the New York Stock Exchange.

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COUNTERSTATEMENT OF THE CASE

American Centennial Insurance Company ("ACIC") issued various insurance policies (excess, umbrella, general liability) to diverse insureds. ACIC reinsured these policies through the Petitioner, Seguros La Republica ("La Republica"), pursuant to 26 facultative certificates (the "Facultative Certificates").[1] ACIC paid losses to its insureds under these policies and then sought to recover the proportionate reinsurance owed it by La Republica.

The instant collection suit is occasioned by La Republica's refusal to indemnify Respondent British International Insurance Company, Limited's ("BIIC"), ACIC's successor-in-interest, pursuant to the Facultative Certificates. Presently, La Republica owes BIIC over $11 million. Pet. App. B at 15a-18a.

Following La Republica's refusal to honor its obligations under the Facultative Certificates, BIIC (ACIC) commenced this action in April 1990 by filing a complaint seeking (i) judgment against La Republica for breach of contract, account stated and monies due and owing, and (ii) a declaration that La Republica is obligated to indemnify BIIC for future losses reinsured by the Facultative Certificates.

---

1. Facultative reinsurance is one of two basic types of reinsurance contracts. Facultative reinsurance is negotiated with respect to specific risks insured by particular policies. Barry R. Ostrager, Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 13.03 at 419 (3d ed. 1990). Under a facultative contract between the ceding insurer and the reinsurer, the reinsurer has the option of accepting or rejecting each risk offered by the ceding company, and a separate reinsurance certificate is issued with respect to each risk assumed. *Id.*

Since then, La Republica has argued before the United States Court for the Southern District of New York (the "Southern District") and United States Court of Appeals for the Second Circuit (the "Second Circuit") — and lost — issues involving personal jurisdiction, improper service of process, and the constitutionality of New York Insurance Law ("NYIL") § 1213. In doing so, the Southern District afforded La Republica every conceivable procedure to ensure that its rights were protected, including two separate evidentiary hearings and untold motions.

After a decade of motion practice, the Southern District ultimately entered a default judgment in favor of BIIC in the amount of $11,251,696.35, plus interest (Pet. App. C at 19a-20a), due to La Republica's failure to obtain a license to do business in New York or to comply with the Southern District's order directing it "to deposit with the Clerk of the Court cash or securities or a surety bond in the amount of Five Million Seven Hundred Thousand Dollars ($5,700,000) to secure payment of any final judgment that may be rendered in this action. . . ." Pet. App. E at 27a. *See* NYIL § 1213(c)(1).[2]

On June 16, 1999, La Republica appealed the default judgment. The Second Circuit rejected La Republica's attack on the constitutionality of NYIL § 1213 and affirmed the Southern District's ruling — holding specifically that "it comports with due process." *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 212 F.3d 138, 144 (2d Cir.

2. While La Republica claims that Article 64 of Mexico's General Law of Insurance Institutions and Mutual Companies prohibits it from posting a bond (Pet. at 3), BIIC submitted expert evidence establishing the contrary. Thus, La Republica's failure to post a bond is due to its own intransigence.

2000).[3] This is the sole issue on which La Republica bases its Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This Court should deny La Republica's Petition for Writ of Certiorari because: (i) there is no compelling reason to warrant review; and (ii) the Second Circuit's decision does not conflict with *Connecticut v. Doehr*, 501 U.S. 1 (1991) ("*Doehr*").

I. LA REPUBLICA'S PETITION FAILS TO STATE A REASON COMPELLING THIS COURT TO REVIEW THE CONSTITUTIONALITY OF NEW YORK INSURANCE LAW SECTION 1213

The sole question presented by La Republica's Petition is whether NYIL § 1213 as applied violates its constitutional right to Due Process under the Fourteenth Amendment. Pet. at *i*. For the reasons expressed in the Circuit Court's opinion below and as discussed herein under Point II, NYIL § 1213 as applied in this case passes constitutional muster. La Republica has not advanced a compelling reason to warrant this Court to grant review. Rules of Supreme Court, Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons").

---

3. In a separate unpublished summary order entered the same day, the Second Circuit remanded for the Southern District's determination whether: (i) the facultative reinsurance certificates covered declaratory judgment expenses; (ii) BIIC's complaint sought recovery of declaratory judgment expenses; and (iii) the record supported La Republica's claim that BIIC failed to prove its entitlement to $52,987.22 in claims.

Moreover, the Second Circuit's decision conforms with the decisions of all other courts addressing the constitutionality of pre-answer security statutes. All analogous statutes have been held to be constitutional. *See* Rules of the Supreme Court, Rule 10(a) (reasons the Court considers in exercising its discretion to grant review includes whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort"). *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (as a matter of normal practice, the Court will defer to the construction of a state statute given to it by the lower federal courts).

Furthermore, La Republica has not sustained its burden to rebut NYIL § 1213's presumed constitutionality. "[A] statute is presumed to be constitutional, . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993). In that context, NYIL § 1213 and other pre-answer security statutes have universally withstood constitutional challenges due to their recognized purpose to further a substantial government interest (*i.e.*, the regulation of insurance by the states). Indeed, not one court has struck down an insurance pre-answer security statute to date. *See, e.g.*, *Lakehead Pipe Line Co., Inc. v. American Home Assur. Co.*, 981 F. Supp. 1205 (D. Minn. 1997); *Mid-American Indemn. Ins. Co. v. King*, 1995 WL 407388 (S. Ct. Tx. 1995); *Curiale v. Ardra Ins. Co.*, 88 N.Y.2d 268, 667 N.E.2d 313 (1996); *Trihedron Int'l Assur. v. Superior Ct.*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (1990).

Section 1213 is New York's version of the Uniform Unauthorized Insurers Act (the "Unauthorized Insurers Act") promulgated by the National Association of Insurance Commissioners in 1948 (the "NAIC"). Forty states have adopted the Unauthorized Insurers Act in some form. (Res. App. A at 8a-14a).[4] The NAIC was acutely aware of due process concerns when drafting the Unauthorized Insurers Act:

> As to the Constitutionality of this section, reference may be made to the case of *Ownbey v. Morgan*, 256 U.S. 94 [(1921)], wherein the Delaware statute requiring posting of bond by a nonresident whose property has been attached before any defense could be made in the action was upheld. Care was taken in the drafting of the act to keep the same constitutional bounds.

Uniform Unauthorized Insurers Act, Prefatory Note, Section 6.

In *Ownbey*, this Court upheld, against due process challenges, a Delaware statute conditioning defendant's right to appear and contest the merits of plaintiff's demand upon his first giving security — in the form of special bail or a surety's undertaking — for the payment of judgment.[5]

4. Nebraska's, Ohio's and Oregon's version of the Unauthorized Insurers Act, however, does not contain pre-answer security requirements. Additionally, Pennsylvania has since repealed its enactment of the Act.

5. The obligation of the out-of-state debtor to post a bond under the Delaware statute at issue in *Ownbey* was triggered upon a creditor

(Cont'd)

In holding the statute constitutional, this Court stated that:

> the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

Ownbey, 256 U.S. at 102-03. Indeed, despite the debtor's claims of hardship, this Court unequivocally concluded that the statute was not arbitrary or unreasonable. *Id.* at 112.

New York courts have repeatedly upheld the constitutionality of NYIL § 1213 and its predecessor statute, Insurance Law § 59-a. *See Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951); *Zacharakis v. Bunkerhill Mut. Ins. Co.*, 281 A.D. 487, 120 N.Y.S.2d 418, 423-24 (1st Dept. 1953); *Kaye v. Doe*, 204 Misc. 719, 125 N.Y.S.2d 135, 139 (Sup. Ct. Bronx Co. 1953). In *Kaye v. Doe*, for example, the court found that if an unauthorized insurer voluntarily engaged in purposeful activity in New York which brought it within the purview of NYIL § 1213,

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(Cont'd)
attaching the in-state property of the debtor. An unauthorized alien reinsurer's obligation under Section 1213(c)(1) to post a bond or obtain a license, however, is triggered upon the commencement of a proceeding against it. *See infra* at 17.

there was no violation of any constitutional provisions arising from its application:

> Any other conclusion would tend to give the out-of-state insurer greater (not equal) protection of the laws, impair the just claims of New York citizens, and deprive them of the obligations to them voluntarily assumed by such insurer. *Due process does not impose such frustration.*

Id. at 142 (construing NYIL § 59-a) (emphasis added).

By voluntarily carrying on insurance business in New York, La Republica has consented and submitted to be sued there and it is subject to the conditions imposed by that state. New York may impose such terms and conditions as it deems proper and may exact such security for the performance of its contracts as in its judgment will best promote the public interest. *See Paul v. Virginia*, 75 U.S. 168, 181 (1869); *cf. Ace Grain Co.*, 95 F. Supp. at 787 (rejecting defendant's Constitutional challenge to the jurisdictional aspects of NYIL § 59-a noting that "[i]t is too late to question the power of New York to impose appropriate regulations on foreign insurers who seek authorization to do business in the state").

The business of insurance, particularly on an interstate and international level, is "affected with a vast public interest." *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Its regulation is left to the states pursuant to the McCarran-Ferguson Act. 15 U.S.C. § 1011, *et seq.* Accordingly, it is subject to the reasonable exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be "reasonably related to the public interest and shall not be arbitrary or

improperly discriminatory." *Trihedron*, 218 Cal. App. 3d at 941, 267 Cal. Rptr. at 422 (citations omitted). The state's interest in ensuring that the obligations arising under insurance contracts and the consequences of those obligations are "faithfully carried out" are to be given "great weight" in determining the state's power to regulate. *Ace Grain*, 95 F. Supp. at 787 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950)).[6]

Relying on this reasoning, the California Court of Appeals in *Trihedron* sustained the constitutionality of California's version of NYIL § 1213:

> Here, when a case arises out of a non-admitted foreign or alien insurer transacting business in California, the state has a valid interest in forcing the insurer to comply with the state's certification

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6. The obligations created through the provisions of NYIL § 1213 are well within the state's power to regulate the business of insurance. Indeed, as noted in *Dean Construction Company, Inc. v. Agricultural Insurance Co.*, 42 Misc. 2d 834, 249 N.Y.S.2d 247 (Sup. Ct. Nassau County), *aff'd*, 22 A.D. 82, 254 N.Y.S.2d 196 (N.Y.A.D. 1964):

> the public policy of this State is to afford residents protection against the obstacles encountered in pursuing their legal rights against alien insurers in foreign forums. The purpose is accomplished first by making unauthorized foreign insurers subject to the jurisdiction of our courts through service on the Secretary of State, and secondly, by requiring the deposit of money or the filing of a bond to insure a fund for the payment of any judgment that may be obtained in the action.

Id. at 249.

> requirements thereby protecting California insureds and beneficiaries. Section 1616 in the first instance requires compliance with those certification requirements. The statute provides the insurer with the generally less onerous alternative of posting a bond in lieu of meeting the certification requirements. Under the unique circumstances, *the bonding requirement can hardly be viewed as a deprivation of a significant property interest subject to due process requirements*. . . . Section 1616's requirements therefore do not deprive insurers of any substantial interest or existing right. Rather the section encourages compliance with the already existing statutory mandate. *Accordingly, we conclude section 1616 does not violate a non-admitted foreign or alien insurer's due process rights when the insurer is sued in connection with transacting insurance business in California.*

Trihedron, 218 Cal. App. 3d at 947-48, 267 Cal. Rptr. at 426 (emphasis added).

Accordingly, BIIC respectfully submits that La Republica's petition fails to establish any reason, let alone a "compelling" reason, for this Court to exercise its discretion to grant review. Therefore, BIIC requests that this Court deny La Republica's Petition for a Writ of Certiorari.

II. THE SECOND CIRCUIT'S RULING IS CONSISTENT WITH, NOT CONTRARY TO, WITH THE PRINCIPLES ENUNCIATED IN *CONNECTICUT v. DOEHR*

A. THE *DOEHR* LINE OF CASES SUPPORT THE CONSTITUTIONALITY OF NYIL § 1213.

La Republica's reliance upon *Doehr* and its progenitor cases is completely without merit. In those cases, this Court struck down prejudgment summary *ex parte* remedies available to general creditors. *Doehr*, 501 U.S. at 5 (attachment of real property); *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1971) (replevin of personalty); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (garnishment of wages). Unlike NYIL § 1213, each of the statutes at issue in those cases involved an outright seizure of property without notice or hearing, depriving its owner of actual possession and enjoyment of the property involved. Accordingly, the *Doehr* line of cases is readily distinguishable.

1. *Doehr*

Unlike the instant case involving a suit against an unlicensed insurance company doing business in New York for money it owes, *Connecticut v. Doehr* involved an action by one private citizen against another for unliquidated damages arising from an assault and battery. As *Doehr* correctly recognized, due process is not a "technical conception with a fixed content unrelated to time, place and circumstance." *Doehr*, 501 U.S. at 10 (citation omitted). *Doehr* dealt with procedural due process depriving a private individual of his property in favor of another private individual. That is on its face quite different from the

regulation and responsibilities of alien, unlicensed insurance and reinsurance companies who are doing business in New York and whose obligations arise out of that business. Even so, the proceedings herein meet the three pronged due process test of *Connecticut v. Doehr*.

First, of what property interest is the Petitioner deprived? La Republica has the right to defend the suit. All it needs to do is to obtain a license, as other insurance companies have done, to carry on business in New York — something which La Republica should have done when it entered into its agreement with BIIC. Alternatively, the Petitioner could post a bond or money to satisfy its proportionate share of the insurance losses paid to the insured by the plaintiff. A due process violation should not be triggered under these circumstances since this procedure is not the same as — or similar to — an attachment or lien on property.

Second, unlike *Doehr*, the risk of erroneous deprivation of property through the procedures under attack and the probable value of alternative safeguards is missing here. La Republica was afforded notice and a hearing. Contrary to *Doehr*, the issue here involves determining the "existence of a debt," an uncomplicated matter that lends itself to documentary proof. *Mitchell v. W.T. Grant & Co.*, 416 U.S. 600, 606 (1973) (upholding a statute finding that determining the existence of a debt or delinquent payments concerns uncomplicated matters than lend themselves to documentary proof). As noted above, La Republica can obtain a license to do business in New York. Further, if it chooses to post a bond or money, there is court supervision over the amount. The safeguards adequately reduce the risk.

Third, it is self-evident that BIIC's interest is not *de minimis*. As with any insurance company which pays its claims, BIIC needs the ability to obtain satisfaction of its reinsurance debts due and owing. This is in harmony with the state's interest in assuring that insurance companies subject to its jurisdiction meet their obligations.

Finally, although *Doehr* modified the third prong of the tripartite due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) from assessing "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail" (*Doehr*, 501 U.S. at 10 (citing *Mathews*, 424 U.S. at 335)) to assessing the interest of the private party seeking the prejudgment remedy, it did so with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11.

In this case, BIIC's interest — the collection of reinsurance balances owed to it under the Facultative Certificates — is on par with New York's ancillary interest as articulated in the preamble to NYIL § 1213.

> The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of

> resorting to distant forums for the purpose of asserting legal rights under such policies.

NYIL § 1213(a).[7] *See Signal Mut. Indem. Ass'n v. Rice Mohawk U.S. Constr. Co., Ltd.*, 1997 WL 148813, *2 (S.D.N.Y. Mar. 28, 1997) ("Insurance Law §1213(c) ensures that New York residents can readily access foreign insurer's funds to satisfy judgments against the insurer") (Res. App. C at 24a). Section 1213 may be invoked by *any* insurance company authorized to do business in New York. *See* § 1213(b)(1)(A); *Morgan v. American Risk Mgmt.*, No. 89 Civ. 2999, 1990 WL 106837 at *6 (S.D.N.Y. July 20, 1990) ("*ARM*") (extending § 1213 to "corporations authorized to do business" in New York) (Res. App. D at 45a); *Aero Assocs., Inc. v. La Metropolitana*, 183 F. Supp 357, 359 (S.D.N.Y. 1960) ("the primary objective of the legislation was to protect New York residents, but the statute went further and encompassed those corporations authorized to do business in New York").[8] Clearly, BIIC and New York

7. It is here that the safeguards of NYIL § 1213 protecting parties against having to endure the "insuperable obstacle of resorting to distant forums" is most illustrative. During the pendency of this case before the Southern District, La Republica filed suit in 1995 in Mexico against nine defendants and fifteen third-party defendants, including BIIC (the "Mexican action"). In doing so, La Republica sought, among other things, to have the very same Facultative Certificates at issue here declared void *ab initio*. La Republica also sought and was granted an injunction enjoining BIIC from taking any action in Mexico to enforce any judgments against La Republica until the Mexican action is completely resolved. Five years later, only BIIC and four of the other fifteen third-party defendants have been served with process in the Mexican action, thwarting any efforts by BIIC to enforce the default judgment in Mexico indefinitely.

8. BIIC's predecessor, ACIC, was authorized to do business in New York at all relevant times, including during the time La Republica issued the Facultative Certificates to ACIC.

have the same interest in seeing La Republica pay the $11 million plus claims it owes pursuant to the Facultative Certificates.

2. *Fuentes* and *Sniadach*

In *Fuentes*, this Court expressly recognized that prejudgment provisional creditors' remedies are fully justified when those provisions serve an important governmental interest or general public interest. *Fuentes*, 407 U.S. at 91. The Court, however, held the statutes unconstitutional because they allowed debtors' property to be seized without notice to the debtor. *Id.* at 83. As discussed above, that is not the case with NYIL § 1213.

Sniadach required a determination as to whether a Wisconsin statute which permitted an employer to garnish an employee's wages without notice violated the due process requirements of the Fourteenth Amendment. "What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen." *Sniadach*, 395 U.S. at 339. The employee argued that the process deprived him of "his enjoyment of earned wages without the opportunity to be heard. . . ." *Id.* The *Sniadach* Court agreed with the employee and ruled Wisconsin's garnishment statute unconstitutional. The *Sniadach* Court's *ratio deciendi* turned on the fact that, although the statute ultimately gave the employee a right to be heard, such a provision had "little reality or worth unless one is *informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*" *Id.* at 339-40 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Again, NYIL § 1213 unequivocally mandates that La Republica be served with notice of the matter. La Republica does not dispute this point. Indeed, after receiving such notice, La Republica chose to appear and over the next decade take advantage of all the due process protections it now claims were never afforded. La Republica seized every opportunity to be heard and to contest this matter. The fact that it lost on each of those opportunities — as it should have — does not diminish the constitutional safeguards afforded by NYIL § 1213. Hence, under the facts of this case and NYIL § 1213's constitutional pre-answer security requirements, BIIC submits that the potential for unwarranted attachment present in *Sniadach* and *Fuentes* is simply not present here.

B. NYIL § 1213 AND THE STATUTE AT ISSUE IN *DOEHR* ARE COMPLETELY DISSIMILAR

Even if NYIL § 1213 is analogized to the creditors' remedies at issue in *Doehr* and like cases, it readily transcends any constitutional challenge since the Connecticut statute at issue in *Doehr* is not even remotely similar to NYIL § 1213 The Connecticut statute provided, in relevant part, that:

> [t]he court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing . . . upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claims and (1) that the prejudgment remedy requested is for an attachment of real property. . . .

Conn. Gen. Stat. § 52-278e (1991). The practical effect of the statute allowed the personal injury plaintiff in *Doehr* to obtain an *ex parte* attachment on defendant's real property. *Doehr*, 501 U.S. at 5.

By contrast, NYIL § 1213 does *not* operate to deprive La Republica of possession of its property. Rather, it provides the following choice

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> > *(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties*, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but *the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment* which may be entered in the proceeding, or
> >
> > *(B) procure a license to do an insurance business in this state.*

NYIL § 1213(c)(1)(A) and (B) (emphasis added). NYIL § 1213's security requirement, like the bond requirement upheld in *Ownbey*, is simply a condition precedent to the right to defend a particular type of suit under New York Insurance law. *Dean Constr. Co. v. Agric. Ins. Co.*, 42 Misc. 2d 834, 835, 249

N.Y.S.2d 247, 248 (Sup. Ct. Nassau Co. 1964). In this regard, NYIL § 1213 may be analogized to the requirement that an appellant post a supersedeas bond as a condition of obtaining a stay pending appeal — a requirement that has repeatedly withstood Constitutional scrutiny. *See, e.g., Christopher Lasalle and Company v. Heller Fin., Inc.*, 731 F. Supp. 279 (E.D. Ill. 1990).

Moreover, NYIL § 1213 merely imposes an obligation upon La Republica to deposit cash, securities or a bond — it does not authorize BIIC to take or seize any of La Republica's specific property. Indeed, NYIL § 1213 is the antithesis of an *ex parte* attachment — it "mandates court supervision before an insurer may be required to post security." *Curiale*, 88 N.Y.2d at 278. And, in enforcing the statute, the court does not rely on its equitable powers — NYIL § 1213 is self-executing since an unauthorized alien reinsurer's obligation to post security (or obtain a license to do business) is triggered upon notice of the proceeding commenced against it *and* before filing any pleading in that proceeding. *Moore v. Nat'l Distiller and Chem. Corp.*, 143 F.R.D. 526, 531 (S.D.N.Y. 1992), *aff'd*, 69 F.3d 1226 (2d Cir. 1995); *Curiale v. Phoenix Gen. Ins. Co. of Greece, S.A.*, 1992 WL 320535, *1 (S.D.N.Y. Oct. 23, 1992) (Res. App. B). Thus, all defendants subject to NYIL § 1213 are "provided notice and an opportunity to be heard. . . ." *Curiale*, 88 N.Y.2d at 278.

III. NYIL § 1213 APPLIES TO REINSURERS

Although the sole issue upon which La Republica bases its Petition is whether NYIL § 1213 violates its rights to due process, it nonetheless overtly seeks a decision that NYIL § 1213 only applies to insurers — not reinsurers. Pet. at 6-7. Although La Republica raised this argument in the Southern District and lost, it did not appeal this issue before the Second Circuit. *British Int'l*, 212 F.3d at 140-41. Nonetheless, the Second Circuit felt compelled "to address the point, as this status resolution underpins the statute's applicability." *Id.* at 141. In doing so, the Second Circuit looked to the *ARM* case, *supra*, and adopted its and other courts' "reasoning, that the argument that a reinsurance contract is not a 'policy of insurance' or a 'contract of insurance' is not sufficient to contravene the express language of § 1101(b)(2)." *Id.* (citing *ARM*, 1990 WL 106837, at *6 (Res. App. D at 41a-44a)). *Accord John Hancock Property and Cas. Ins. Co. v. Universale Reinsurance Co., Ltd.*, 147 F.R.D. 40, 50 (1993) (adopting the reasoning of *ARM*). *ARM* and thus, the Second Circuit, expressly rejected La Republica's attempted distinction:

> The express language of § 1101(b)(2) demonstrates that "although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, . . . it did not intend that unauthorized reinsurers be exempted from New York's long arm statute and security requirements."

* * *

> [Indeed], "it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to have the security requirements."

British Int'l, 212 F.3d at 141 (citations omitted). Accordingly, the Second Circuit correctly rejected La Republica's contention that it did not have to comply with New York's licensing requirements. *British Int'l Ins. Co.*, 212 F.3d at 143 ((citing *Curiale*, 88 N.Y. 2d at 277, 644 N.Y.S.2d 663, 667 N.E.2d 313) ("[T]he ability to conduct insurance business free from legitimate government regulation is not a constitutionally protected property or liberty interest.")). *See Ace Grain*, 95 F. Supp. at 787 ("In requiring [La Republica] to post a sufficient bond as a condition of filing on answer and making defense, New York is requiring no more of [La Republica] than it constitutionally requires of any authorized foreign insurer. [La Republica] has no constitutional right to preferential treatment").

Finally, while advancing its argument before this Court that NYIL § 1101(b)(2)(G) exempts it from the licensing and other requirements imposed by New York's insurance law, La Republica conveniently ignores NYIL § 1108 which specifically identifies types of insurers who are exempt from New York's stringent insurance regulations; none of which apply to do unauthorized alien reinsurers such as La Republica. Although, La Republica suggests that it has unfettered discretion as to how it conducts business in New York, in reality La Republica is faced with a choice of becoming licensed to do business in New York or posting a bond or other security before defending any actions. The fact that La Republica is unwilling to comply with the choices offered by New York does not equate to a deprivation of its due process rights.

IV. DECLARING PRE-ANSWER SECURITY STATUTES ENACTED IN OVER THIRTY-SIX STATES UNCONSTITUTIONAL WOULD HAVE A SIGNIFICANT IMPACT ON THE GLOBAL REINSURANCE MARKET

La Republica's final claim is that continued enforcement of pre-answer security statutes restricts insurance companies' access to the entire global reinsurance market. La Republica's arguments stand the modern reinsurance world on its head.

Contrary to this argument, security statutes are directly responsible for the global reinsurance market's continued survival. One need only look to the proliferation of reinsurance disputes caused by, among other things, the environmental and product liability cases brought in the 1980s to see the fallacy of La Republica's logic. *See, e.g., Mutual Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52 (3d Cir. 1989). Pre-answer security statutes which require financial certainty, helped the insurance market survive the 1980s and remain intact today. Indeed, if all reinsurers were permitted to breach their reinsurance obligations, abscond with the premiums, and take refuge behind their international borders, insurance companies would be forced to pay millions of dollars in claims without recourse to the reinsurance protection which was purchased. The potential catastrophic consequences — including the potential insolvency of the insurance company — should not be a policy goal of international reinsurance. *See Signal Mut.*, 1997 WL 148813, *2 (Res. App. C at 22a-24a) ("Insurance Law §1213(c) ensures . . . [ready] access [to] foreign insurer's funds to satisfy judgments against the insurer.").

Accordingly, BIIC respectfully submits that pre-answer security statutes help to maintain a level playing field as between a domestic insurer and its foreign or alien reinsurers. Therefore, contrary to La Republica's claims, any repudiation thereof would have a catastrophic effect upon the global reinsurance market.

CONCLUSION

For the reasons set forth above, Respondent BIIC respectfully requests that this Court deny La Republica's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — UNAUTHORIZED INSURERS PROCESS ACT

Model Regulation Service — October 1994

UNAUTHORIZED INSURERS PROCESS ACT

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Introduction

An Act relating to insurers not authorized to transact business in this state; providing for actions in this state against and for the service of process upon these insurers; prescribing how a defense may be made by these insurers; and providing for the allowance of attorneys' fees in actions against these insurers.

Section 1. Purpose of Act

The purpose of this Act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of insureds or beneficiaries under insurance contracts.

The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued

or delivered in this state by insurers while not authorized to do business in this state, thus presenting to these residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under these policies. In furtherance of the state interest, the legislature herein provides a method of substituted service of process upon the insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this state, and also exercises powers and privileges available to the state by virtue of United States Code tit. 15 § 1011, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

Section 2. Service of Process Upon Unauthorized Insurer

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer is equivalent to and shall constitute an appointment by the insurer of the Commissioner of Insurance and the commissioner's successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of a contract of insurance, and any act shall be signification of its agreement that the service of process is of the same legal force and validity as personal service of process in this state upon the insurer.

(1) The issuance or delivery of insurance contracts to residents of this state or to corporations authorized to do business in the state;

(2) The solicitation of applications for insurance contracts;

(3) The collection of premiums, membership fees, assessments or other considerations for insurance contracts; or

(4) Any other transaction of insurance business.

Drafting Note: Insert the title of the chief regulatory official wherever the term "commissioner" appears.

B. Service of process shall be made by delivering to and leaving with the commissioner or some person in apparent charge of the office two (2) copies thereof and the payment of the fees prescribed by law. The commissioner shall forthwith mail by registered mail one of the copies of the process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon the commissioner. The service of process is sufficient, provided notice of such service and a copy of the process are sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing compliance are filed with the clerk of the court in which the action

is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

C. Service of process in an action, suit or proceeding shall, in addition to the manner provided in Subsection B of this section, be valid if served upon a person within this state who, in this state on behalf of the insurer, is:

(1) Soliciting insurance; or

(2) Making, issuing or delivering any contract of insurance; or

(3) Collecting or receiving any premium, membership fee, assessment or other consideration for insurance;

and a copy of the process is sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter in registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which the action is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

D. A plaintiff or complainant shall not be entitled to a [insert appropriate state procedure, either judgment by default, or a judgment with leave to prove damages, or a judgment *pro confesso*] under this section until the expiration of thirty (30) days from the date of the filing of the affidavit of compliance.

E. Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

Section 3. Defense of Action By Unauthorized Insurer

A. Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the unauthorized insurer shall deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or file with the clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action; or procure a certificate of authority to transact the business of insurance in this state.

B. The court in any action, suit or proceeding in which service is made in the manner provided in Section 2B or 2C may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the

provisions of Subsection A of this section and to defend the action.

C. Nothing in Subsection A of this section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 2B or 2C on the ground either that:

(1) The unauthorized insurer has not done any of the acts enumerated in Section 2A; or

(2) The person on whom service was made pursuant to Section 2C was not doing any of the acts therein enumerated.

Section 4. Attorney Fees

In an action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty (30) days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that the refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include the fee in any judgment that may be rendered in the action. The fee shall not exceed twelve and one-half percent (12-1/2%) of the amount that the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall the fee be less than $25. Failure of an insurer to defend an action shall be deemed

prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

Section 5. Constitutionality

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 6. Short Title

This Act may be cited as the Unauthorized Insurers Process Act.

Legislative History (all references are to the Proceedings of the NAIC).

1949 Proc. 315-316 (adopted).
1951 Proc. 161, 166-168, 182 (printed and reaffirmed).

Appendix A

The date in parentheses is the effective date of the legislation or regulation, with latest amendments.

NAIC MEMBER	MODEL/ SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama	ALA. CODE §§ 27-10-50 to 27-10-56 (1951/1971).	
Alaska		ALASKA STAT. §§ 21.33.011 to 21.33.035 (1968/1992).
Arizona	ARIZ. REV. STAT. ANN. §§ 20-403 to 20-406 (1972).	
Arkansas	ARK. STAT. ANN. §§ 23-65-201 to 23-65-205 (1959).	
California	CAL. INS. CODE §§ 1610 to 1619 (1949/1982).	CAL. INS. CODE § 12931 (1970/1985).
Colorado	COLO. REV. STAT. §§ 10-3-1001 to 10-3-1005 (1955/1963).	

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Connecticut	CONN. GEN. STAT. § 38a-27 (1970/1990).
Delaware	DEL. CODE ANN. tit. 18 §§ 2101 to 2108 (1956).
D.C.	NO ACTION TO DATE
Florida	FLA. STAT. §§ 626.904 to 626.912 (1982).
Georgia	GA. CODE §§ 33-5-50 to 33-5-59 (1960).
Guam	GUAM GOV'T. CODE §§ 43129 to 43131 (1959).
Hawaii	HAWAII REV. STAT. §§ 431:8-206 to 431:8-211 (1988).
Idaho	IDAHO CODE §§ 41-1204 to 41-1210 (1961).
Illinois	215 ILL. COMP. STATS. 5/123 (1949/1983).

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Indiana	IND. CODE §§ 27-4-4-1 to 27-4-4-8 (1955/1985).	
Iowa		IOWA CODE § 507A.6 (1967).
Kansas	KAN. STAT. ANN. §§ 40-2001 to 40-2006 (1949).	
Kentucky	KY. REV. STAT. § 304.11-040 (1982).	
Louisiana	LA. REV. STAT. ANN. §§ 22:1253 to 1256 (1958/1968).	
Maine	ME. REV. STAT. ANN. tit. 24-A §§ 2102 to 2108 (1970/1973).	
Maryland		MD. ANN. CODE INS. § 4-206 (1957/1997).
Massachusetts	MASS. GEN. LAWS ch. 175B §§ 1 to 6 (1950).	
Michigan	NO ACTION TO DATE	

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Minnesota	MINN. STAT. § 60A-21 (1978/1984).
Mississippi	MISS. CODE ANN. §§ 83-21-33 to 83-21-51 (1958).
Missouri	MO. REV. STAT. §§ 375.256 to 375.301 (1967).
Montana	MONT. CODE ANN. §§ 33-1-611 to 33-1-616 (1959).
Nebraska	NEB. REV. STAT. §§ 44-137.01 to 44-137.10 (1949/1989).
Nevada	NEV. REV. STAT. §§ 685B.050 to 685B.080 (1971).
New Hampshire	N.H. REV. STAT. ANN. §§ 406-B:4 to 406-B:7 (1967/1971).
New Jersey	N.J. REV. STAT. §§ 17B:33-1 to 17B:33-9 (1971); 17:51-1 to 17:51-5 (1952/1953).

Appendix A

New Mexico	N.M. STAT. ANN. §§ 59A-15-6 to 59A-15-8 (1985).	
New York	N.Y. INS. LAW § 1213 (1984).	
North Carolina	N.C. GEN. STAT. § 58-16-35 (1955/1990).	
North Dakota	N.D. CENT. CODE §§ 26.1-02-10 to 26.1-02-12 (1983).	
Ohio	OHIO REV. CODE ANN. § 3901.26 (1965).	
Oklahoma		OKLA. STAT. tit. 36 §§ 1103 to 1105 (1957).
Oregon	OR. REV. STAT. §§ 746.320 (1967/1981).	
Pennsylvania	PA. CONS. STAT. § 40-1-206 (1976).	
Puerto Rico		P.R. LAWS ANN. tit. 26 §§ 1005 to 1006 (1977).

Appendix A

Rhode Island	R.I. GEN. LAWS §§ 27-16-3 to 27-16-14 (1956).	
South Carolina	S.C. CODE ANN. §§ 38-25-510 to 38-25-560 (1988).	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-8-6 to 58-8-19 (1966/1975).	
Tennessee	TENN. CODE ANN. §§ 56-2-601 to 56-2-609 (1955).	
Texas	TEX. INS. CODE ANN. art. 1.14-1 (1967/1983); art. 1.35 (1987).	
Utah		UTAH CODE ANN. §§ 31A-2-309 to 31A-2-311 (1965).
Vermont	VT. STAT. ANN. tit. 8 §§ 3381 to 3390 (1968).	
Virgin Islands		V.I. CODE ANN. tit. 22 § 665 (1968).

Appendix A

Virginia		VA. CODE §§ 38.2-800 to 38.2-807 (1986).
Washington		WASH. REV. CODE ANN. §§ 48.05.200 to 48.05.220 (1947/1981).
West Virginia	W.VA. CODE § 33-4-13 (1957/1992).	
Wisconsin		WIS. STAT. §§ 601.72 to 601.73 (1979/1981).
Wyoming		WYO. STAT. §§ 26-12-201 to 26-12-206 (1967/1983).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *CURIALE v. PHOENIX GENERAL INSURANCE COMPANY OF GREECE, S.A.*, No. 83 Civ. 4687 (CSH) DATED OCTOBER 23, 1992

United States District Court
S.D. New York.

Salvatore R. CURIALE, Superintendent of Insurance of the State of New York, as Liquidator of Ideal Mutual Insurance,

Plaintiff,

v.

PHOENIX GENERAL INSURANCE COMPANY OF GREECE, S.A.,

Defendant.

No. 83 Civ. 4687 (CSH).

Oct. 23, 1992.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

By Notice of Motion dated December 27, 1991, plaintiff moves for an order compelling defendant to post security for judgment, pursuant to New York Insurance Law § 1213(c)(1)(A). In the alternative, plaintiff moves to strike

defendant's answer and moves for the entry of a default judgment.

Familiarity with the facts of this case, which are set forth in several previous opinions by this Court, is assumed. For the purposes of this motion, the relevant facts are set forth briefly as follows.

Plaintiff Salvatore R. Curiale is the Liquidator of the Ideal Mutual Insurance Company ("Ideal"), a New York corporation. Defendant Phoenix General Insurance Company of Greece, S.A. ("Phoenix") is an insurance company organized under the laws of Greece.

From 1975 to 1984, Ideal used the services of Global Aviation Insurance Manager, Inc. ("Global Aviation") to manage the reinsurance of aviation insurance policies issued by Ideal. Global in turn used the services of London reinsurance intermediaries, who negotiated reinsurance treaties with an array of reinsurers, including defendant Phoenix. In this lawsuit Curiale, Ideal's Liquidator, seeks more than $1.6 million in damages for Phoenix's breach of reinsurance agreements.

After referring the case to arbitration on July 2, 1984, this Court rescinded the arbitration order in 1987 and restored the case to the Court's active calendar. In December 1988 this Court entered an order formally substituting the Liquidator as the plaintiff. Settlement negotiations collapsed in early 1991, and Curiale filed an amended complaint on July 9, 1991. The amended complaint set forth the specific balances owed to the Liquidator under the relevant

reinsurance agreements. On July 26, 1991, defendant answered. Plaintiff advised defendant of the security requirements of § 1213(c)(1)(A), but defendant resisted. Plaintiff then filed the motion presently before the Court.

Defendant opposes plaintiff's motion on three grounds: 1) that Section 1213(c)(1)(A) of the New York Insurance Law applies to insurers — not reinsurers; 2) that plaintiff waived its right to raise the security requirement; and 3) that the application of Section 1213(c)(1)(A) to this case would be unconstitutional.

The first issue raised by Phoenix has previously been considered by this Court. For the reasons stated in Morgan v. American Risk Management, Inc., 89 Civ. 2999, 1990 WL 106837 (S.D.N.Y. July 20, 1990), I hold that Section 1213(c) applies to reinsurers as well as insurers. See also Moore v. National Distillers and Chemical Corporation, 91 Civ. 2901, 1992 WL 238181 (S.D.N.Y. Aug. 14, 1992); American Centennial Insurance Company v. Seguros La Republica, S.A., 91 Civ. 1235, 1992 WL 162770 (S.D.N.Y. June 22, 1992); American Centennial Insurance Company v. Seguros La Republica, S.A., 90 Civ. 2370, 1992 WL 147626 (S.D.N.Y. June 16, 1992).

The waiver argument has also been addressed by this Court. In her opinion in Moore, Magistrate Judge Roberts noted that "the language of § 1213 does not require a timely demand of pre-answer security; the language only sets a trigger for security." 1992 WL 238181, at *4. In the case at bar, Curiale simply waited until defendant answered to see if defendant would post the security. Defendant did not do

so, so plaintiff filed the present motion. That hardly provides fodder for a waiver argument.

As for defendant's third argument, the New York legislature enacted § 1213 pursuant to that power conferred upon the States by the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. As the Supreme Court has stated, "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. . . ." Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 653 (1981) (citations omitted). See also Levy v. Lewis, 635 F.2d 960, 963-64 (2d Cir.1980) (McCarran-Ferguson states a clear congressional mandate "that regulation of the insurance industry be left to the individual states."). Accordingly, I reject Phoenix's constitutional attack. See Moore, 1992 WL 238181, at *6.

The defendant is directed to post a bond with the Clerk of the Court in the amount of $1,633,674.92 by November 16, 1992. If defendant fails to do so, its answer will be stricken and default judgment will be entered against it.

It is SO ORDERED.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. v. RICE MOHAWK U.S. CONSTRUCTION COMPANY, LTD.*, No. 95 Civ. 3721 (LMM) DATED MARCH 28, 1997

United States District Court,
S.D. New York.

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
a foreign corporation,

Plaintiff,

v.

RICE MOHAWK U.S. CONSTRUCTION COMPANY,
Ltd., a New York corporation,

Defendant.

No. 95 Civ. 3721 (LMM).

March 28, 1997.

MEMORANDUM AND ORDER

MCKENNA, District Judge.

Defendant, Rice Mohawk U.S. Construction Company, Ltd. ("Rice") moves to strike the reply of Plaintiff, Signal Mutual Indemnity Association, Ltd. ("Signal"), to Rice's

counterclaim, on the ground that Signal failed to comply with state insurance law.

For the reasons set forth below, Defendant's motion to strike Signal's reply to its counterclaim and for entry of default judgment on its counterclaim is denied on the condition that plaintiff post a bond for $100,000 in accordance with New York Insurance Law § 1213(c)(1) within forty-five (45) days of the date of this Memorandum and Order.

I. Factual Background

Signal is a foreign corporation, incorporated under the laws of Bermuda, with its principal place of business in Bermuda. As a self-insurer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., ("LHWCA"), Signal provides insurance coverage to its "members," most of which are employers whose employees are covered by the LHWCA. (Complaint ¶¶ 1, 3-4). Rice is a New York corporation with its principal place of business in New York. (Complaint ¶ 2).

In November 1992, Signal and Rice entered into a contract whereby Rice became a "member" of Signal in exchange for Signal's commitment to provide workers' compensation to Rice's entitled employees. (Complaint ¶¶ 4, 5). Under state law, Signal's obligations to Rice allowed Signal to operate as a foreign insurer in New York.

On May 22, 1995, Signal commenced this action by filing a complaint against Rice for breach of this contract.

Signal alleges that Rice failed to make mandatory payments in accordance with Signal's by-laws.[1] On July 18, 1996, Rice answered the complaint and counterclaimed, alleging that Signal, not Rice, breached the contract in question. Rice, citing Signal's failure to comply with a New York State Insurance Law provision, moves to strike Signal's reply to Rice's counterclaim and to enter a default judgment in its favor.

II. Discussion

A. New York Insurance Law § 1213(c)(1)

Federal regulations require LHWCA self-insurers to deposit funds in the United States as security and proof of financial accountability. 20 CFR § 703.301 (1996). New York State insurance laws require foreign insurers to deposit a bond with the court or to procure an insurance license from the state before such insurer pleads in any proceeding against that insurer. N.Y. INSURANCE LAW § 1213(c)(1) (McKinney 1985). Signal maintains accounts in Illinois, in accordance with the federal requirement, but has neither deposited a bond nor received an insurance license in New York to comply with state law.

Rice argues that Signal's failure to comply with § 1213(c)(1) precludes Signal from replying to Rice's counterclaim. Signal counters that although it has failed to

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1. For a more detailed history of this dispute, see this Court's order denying defendant's 12(b)(1), 12(b)(4), and 12(b)(6) motions dated June 17, 1996.

comply with § 1213(c)(1), the LHWCA pre-empts the New York statute. According to Signal, this federal pre-emption relieves Signal of any obligation to comply with the New York law.

B. Pre-emption Generally

The pre-emption doctrine, under which Federal statutes displace state laws and regulations, originates in the Supremacy Clause, U.S. CONST., Art. VI, cl. 2. Consideration of the pre-emption doctrine requires the court to examine both explicit and implicit congressional intent. Barnett Bank of Marion Country, N.A. v. Nelson, 517 U.S. 25, __, 116 S.Ct. 1103, 1107, 134 L.Ed.2d 237 (1996); Fidelity Fed. Say. and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Rarely will the language of a federal statute explicitly state that federal law pre-empts existing state laws. Barnett Bank, 517 U.S. at __, 116 S.Ct. at 1108. Therefore, the court must consider the language and purpose of the federal statute in search of an implicit intent to pre-empt state law. Id.; Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 203, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

Absent such intent, federal law will pre-empt state law only when compliance with both is either a "physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or when the state law impedes Congress' objectives. Fidelity Fed., 458 U.S. at 153 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

Consequently, application of the pre-emption doctrine must remain flexible, "especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." Farmer v. United Bhd. of Carpenters and Joiners of Am., 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

C. The Longshore and Harbor Workers' Compensation Act

Congress created the LHWCA to guarantee compensation for marine workers previously excluded by the then-existent maritime laws. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 717-718, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). Signal contends that the self-insurer regulations contained in the LHWCA evidence Congress' intent to pre-empt state laws governing workers' compensation. In Sun Ship, Inc., however, the Supreme Court found "no sign . . . that Congress wished to alter the accepted understanding that federal jurisdiction would co-exist with state compensation laws." Id. at 722 (holding that injured maritime workers eligible for compensation under the LHWCA could nevertheless claim compensation under state compensation laws).

Nor has Congress tacitly indicated a desire to pre-empt New York state insurance law. A state law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). In the instant case, Signal

can adhere to state regulations without compromising Congress' interests in the welfare of the maritime workers. Florida Lime, 373 U.S. at 142-43.

Signal fails to differentiate between Congress' purpose in creating the LHWCA, and the New York legislature's purpose in establishing the laws governing foreign insurers. Congress enacted the LHWCA in the interest of maritime workers. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Perini North River Assoc., 459 U.S. 297, 306, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). In contrast, the New York legislature created Insurance Law § 1213(c) for the protection of its residents. N.Y. INSURANCE LAW § 1213(c) (McKinney 1985 & Supp. 1997); Curiale v. Ardra Ins. Co., 88 N.Y.2d 268, 644 N.Y.S.2d 663, 667-8, 667 N.E.2d 313 (Ct.App.1996). Insurance Law § 1213(c) ensures that New York residents can readily access a foreign insurer's funds to satisfy judgments against that insurer. Curiale, 644 N.Y.S.2d at 667, 667 N.E.2d 313. Such precautions enable foreign insurers like Signal to operate in New York without first obtaining insurance licenses. Consequently, this provision benefits both the residents of New York and the foreign insurance companies allowed to operate in New York.

D. McCarran-Ferguson Act Anti-Pre-emption Rule

The McCarran-Ferguson Act instructs that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C.

§ 1012(b) (1976). Signal argues that the existence of this statute, and the language contained therein, provides further evidence of Congress' intent to pre-empt states' participation in insurance regulation. Signal overlooks, however, that the "the first clause of [§ 1012] 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." U.S. Dep't. of Treasury v. Fabe, 508 U.S. 491, 505, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

The McCarran-Ferguson Act expands state control over insurance industries operating within the state. This expansion necessarily includes New York State's ability to regulate the activities of foreign insurers. Additionally, Congress created the McCarran-Ferguson Act to ensure that state regulation would not be subject to inadvertent federal intrusion. Barnett Bank, 517 U.S. at __, __, 116 S.Ct. at 1112, 15 U.S.C. § 1012 (1976 & Supp.1996). The Act provides that state law should prevail unless a federal statute specifically relating to the "business of insurance" conflicts with a state law. 15 U.S.C. § 1012 (1976 & Supp.1996); see also Barnett Bank, 517 U.S. at __, 116 S.Ct. at 1111. No such conflict exists between the New York State law for foreign insurers and insurer obligations enumerated under the LHWCA.

Finally, to qualify for exception under the McCarran-Ferguson Act, the LHWCA would have to specifically relate to the "business of insurance." As discussed above, the

LHWCA creates and guarantees workers' compensation for maritime workers. 33 U.S.C. § 901, et seq. (1986 & Supp. 1996). Thus, the insurance policies created to support the provisions of the LHWCA are incidental.

III. Conclusion

For the reasons set forth above, defendant's motion to strike plaintiff's reply and for entry of default judgment on its counterclaim is denied on the condition that plaintiff post a bond for $100,000 in accordance with § 1213(c) of the New York Insurance Law within forty-five (45) days of the date of this Memorandum and Order. Either party may move, for good cause shown, to increase or decrease the amount of the bond.

SO ORDERED.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *MORGAN v. AMERICAN RISK MANAGEMENT, INC.*, No. 89 CIV 2999 (JSM) (KAR) DATED JULY 20, 1990

United States District Court,
S.D. New York.

Leroy MORGAN, Commissioner of Insurance of the Commonwealth of Kentucky, in his capacity as Liquidator of Delta America Re Insurance Company,

Plaintiff,

v.

AMERICAN RISK MANAGEMENT, INC., et al.,

Defendants.

No. 89CIV2999(JSM)(KAR).

July 20, 1990.

* * *

OPINION AND ORDER

KATHLEEN A. ROBERTS, United States Magistrate:

This action for declaratory relief, specific performance, and damages arises from a management contract and reinsurance treaties entered into by Delta America Re

Insurance Company ("Delta Re") and defendants. The suit was filed on May 2, 1989 and referred to me on July 18, 1989 to supervise discovery, and on October 30, 1989 to decide the pending motion.

Plaintiff, the Kentucky Commissioner of Insurance, commenced this action in his capacity as the Liquidator of Delta Re, an insolvent reinsurance company chartered under the laws of Kentucky and, prior to its insolvency, authorized to do business in New York. Complaint ¶¶ 1, 2. Defendant American Risk Management, Inc. ("ARM"), an Ohio Corporation, provided management services to Delta Re from 1983 until the reinsurance company was declared to be insolvent in September, 1985. Id. ¶¶ 4, 7. Defendant Frederic Reiss was the sole shareholder and chairman of ARM, as well as of defendants International Risk Management Limited, European Risk Management Limited, Transnational Risk Management Limited, Universal Management Limited, and Transnational Risk Management (Guernsey) Limited, foreign corporations that also provided insurance management services. These foreign corporations, together with ARM, were allegedly operated under a common management structure headed by Mr. Reiss. Id. ¶¶ 5, 6. Defendants Robert Norton, John Ryan, Brian Murphy, and Arthur Deters, were officers and directors of Delta Re and of ARM or of other Reiss companies. Id. ¶¶ 8-12. The remaining defendants are twenty-three foreign and alien retrocessionaires (the "retrocessionaires"), who signed reinsurance treaties[1] with Delta Re, agreeing to accept a share

1. A contract for reinsurance is called a "reinsurance treaty." Reinsurance is "the ceding by one insurance company to another of (Cont'd)

of the risks underwritten by Delta Re in 1984 and 1985.[2] Id. ¶¶ 15-37. The treaties were delivered to and signed by Delta Re in New York.

Presently before the court is a motion by the retrocessionaires to be relieved of the requirement of posting pre-answer security pursuant to N.Y.Ins.Law § 1213(c)(1) (McKinney 1985),[3] which plaintiff contends is applicable to

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(Cont'd)
all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matters prior to and subsequent to loss." 13A J. Appleman & J. Appleman, Insurance Law and Practice § 7681, at 480-81 (rev. ed.1976). Retrocessionaires, in turn, reinsure the risks assumed by the reinsurer. See Complaint ¶ 13.

2. The retrocessionaires are companies organized under the laws of, and operating in various foreign jurisdictions, including Bermuda, the Cayman Islands, and the Channel Islands. Two of the retrocessionaires are organized under the laws of Vermont. None of them is authorized to conduct an insurance business in New York.

3. Section 1213(c)(1) provides:

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by

(Cont'd)

this action.[4] See Complaint ¶ 39. The retrocessionaires argue

(Cont'd)

> the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in this state.

4. The following defendant-retrocessionaires are represented by Bower & Gardner: Aegis Indemnity Ltd., Bakerlooe Insurance Co., Ltd., Berda Developments Ltd., Brittany Insurance Co., Ltd., Centennial Assurance Co., Ltd., Conoplex Insurance Co., Ltd., Constantine Insurance Co., Ltd., Elco Insurance Co., Inc., Elwood Insurance Co., Ltd., General Insurance Co., Ltd., Horizon Insurance Co. Ltd., Riscott Insurance Ltd., Ross Insurance Ltd., Sperry Insurance Co., Ltd., Three Rivers Insurance Co., Trochus Insurance Company, Ltd., Twinsurance, Ltd., United Insurance Co., ver Bes' Insurance Co., and Westburne Insurance Co., Ltd. Bower & Gardner submitted a memorandum of law dated September 5, 1989 ("Bower & Gardner Memorandum") and a reply letter dated October 18, 1989 ("Bower & Gardner Reply"). Defendant-retrocessionaire Saturn Insurance Co., Ltd., is represented by Jones, Day, Reavis & Pogue, who submitted a letter memorandum of law dated September 5, 1989 ("Jones, Day Memorandum") and a reply letter dated October 13, 1989 ("Jones, Day Reply"). Defendant-retrocessionaire Transnational Ltd. is represented by LeBoeuf, Lamb, Leiby & MacRae, who submitted a letter memorandum of law dated October 13, 1989 ("LeBoeuf, Lamb Memorandum") and a reply letter dated

(Cont'd)

1) that the statute is inapplicable to disputes over reinsurance treaties; 2) that even if the statute did apply to reinsurance, plaintiff is not presently a "resident" of New York, and therefore not entitled to invoke it; and 3) that the statute can only apply to actions to determine the scope of an insurance contract — that is, to coverage claims — not to an action such as this one to determine the contract's validity. In the alternative, the retrocessionaires argue that the amount of pre-answer security should be no more than that which would be immediately payable to plaintiff upon a judgment in his favor.

For the reasons set forth below, I find that the retrocessionaires are required to post pre-answer security pursuant to § 1213(c)(1). However, I find that the amount of security should not exceed the retrocessionaires' proportionate share of Delta Re's paid losses — that is, the amount that Delta Re's ceding insurance companies have reported as paid claims — minus the amount the Liquidator has already drawn down on the letters of credit earlier provided by the retrocessionaires.

(Cont'd)
May 1, 1990 ("LeBoeuf, Lamb Reply"). Defendant-retrocessionaire Trafford Park Insurance, Ltd. is represented by Werbel McMillin & Carnelutti and joined in the pending motion by a letter to the court dated September 5, 1989.

Plaintiff submitted a memorandum of law dated October 2, 1989 ("Plaintiff's Memorandum") and a sur-reply memorandum of law dated May 1, 1990 ("Plaintiff's Sur-Reply").

Appendix D

BACKGROUND

On September 30, 1983, Delta Holdings, Inc. bought Elkhorn Insurance Company ("Elkhorn") from National Distillers and Chemical Corporation ("Distillers") for $18 million.[5] After its sale, Elkhorn was renamed Delta Re.

Delta Re was a reinsurance company organized under the laws of Kentucky, with offices in Louisville, Kentucky and New York City. Prior to insolvency proceedings in 1985, Delta Re was licensed to conduct an insurance business in New York and Kentucky. Delta Re and the retrocessionaires entered into a one-year 40% Quota Share Treaty ("Treaty") effective January 1, 1984. This Treaty, actually twenty-four separate agreements with the individual retrocessionaires, was renewed effective January 1, 1985. In each case, the Treaty was delivered to Delta Re in New York. Under the Treaty, Delta Re ceded to each retrocessionaire a given percentage of its risks, totalling 40 percent of Delta Re's business. Before Delta Re's liquidation, the retrocessionaires provided Delta Re with $5.3 million dollars in irrevocable letters of credit, in compliance with Article X of the Treaty, which gave Delta Re the right to request funding for "unearned premiums and outstanding losses including, where appropriate, an allowance for incurred but not reported losses * * *."

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5. In Delta Holdings, Inc. v. National Distillers and Chemical Corp., 85 Civ. 3439 (April 10, 1990), Judge Keenan ordered the rescission of the sale of Elkhorn because of Distillers' misrepresentations and omissions regarding the true financial condition of Elkhorn, which had been insolvent for some time prior to the sale. Distillers, renamed Quantum Chemical Corporation, has been joined as a third-party defendant in this action.

Appendix D

On September 15, 1985, the Franklin, Kentucky Circuit Court found Delta Re to be insolvent and appointed plaintiff as Liquidator to supervise its dissolution. When the retrocessionaires learned that Delta Re had been insolvent as early as 1983, at the time it solicited their participation in the 40% Quota Share Treaty, they notified the Liquidator of their rescission of the Treaty, on the alternative grounds of misrepresentation or mutual mistake of fact. The Liquidator then demanded that the retrocessionaires post additional letters of credit pursuant to Article X of the Treaty. The retrocessionaires, who regarded the Treaty as void, refused to do so. Prior to commencement of this action, the Liquidator drew down the $5.3 million in letters of credit earlier provided by the retrocessionaires and treated the cash — today totalling over $6 million (including interest) — as assets of Delta Re.

The Liquidator commenced this action against Delta Re's retrocessionaires and against the management company that operated Delta Re on May 2, 1989. The complaint alleges that the retrocessionaires have refused to pay sums due Delta Re under the Treaty and have indicated their refusal to pay sums that may become due in the future. Complaint ¶ 55. The Liquidator alleges that the Treaty is fully enforceable and seeks a declaratory judgment of the parties' rights and obligations under it. Id. ¶¶ 56, 58. The Liquidator further seeks damages in the amount of the sums allegedly past due under the Treaty, as well as an order requiring the retrocessionaires to specifically perform their future payment obligations under the Treaty. Id. ¶ 62. As against the management company, the Liquidator seeks to recover the same sums and all future "reinsurance recoverables" if the

retrocessionaires are held not liable for them. Id. ¶¶ 56, 66, 69.

Pursuant to N.Y.Ins.Law § 1213(c)(1), plaintiff also seeks an order directing the retrocessionaire defendants to post a bond for $41,893,700, an amount consisting of three components. Plaintiff's Memorandum at 3; Affidavit of James E. Dickinson, dated September 28, 1989 (Dickinson Aff.) The first component ($6,746,071), "paid losses," consists of claims that the ceding insurance companies have reported as paid and for which the ceding companies await indemnification from Delta Re. The second component ($12,672,729), "case reserves" or "outstanding loss reserves," are claims of loss received by the ceding companies and reported to Delta Re, but not yet paid by the ceding companies. The third component ($22,474,900), "incurred but not reported losses" (IBNR), represents an actuarial estimate of Delta Re's liability for losses that have occurred, but have not yet been reported as claims. See Dickinson Aff. ¶¶ 7-8, 10; Bower & Gardner Memorandum at 8; Jones, Day Memorandum at 13-14.

The Parties' Contentions

The retrocessionaires argue that the statute does not apply to disputes over reinsurance treaties. See Bower & Gardner Memorandum at 11-14; Jones, Day Memorandum at 6-10; LeBoeuf, Lamb Memorandum at 6-10. This argument is based, in part, on the statement of legislative intent contained in § 1213(a), which declares that the statute was intended to aid residents holding "policies of insurance" delivered in the state by unauthorized insurers, by making

those insurers amenable to process in New York. N.Y.Ins. Law § 1213(a). Reinsurance treaties, the retrocessionaires assert, are not "policies of insurance," but "contracts of indemnity," a category that the statute does not cover. Moreover, the retrocessionaires contend, § 1213 was intended as a "consumer" statute, designed to equalize the balance of power between the small policyholder and the large, sophisticated insurance company, not as a tool for an experienced reinsurance company to gain a "tactical advantage" over other reinsurers, with whom it stands on equal footing. Bower & Gardner Memorandum at 10-11; Jones, Day Memorandum at 8-10; LeBoeuf, Lamb Memorandum at 3-4.

The retrocessionaires further argue that the Liquidator is not entitled to invoke the pre-answer security requirement of § 1213(c)(1) because Delta Re, which has not been authorized to do business in New York for over four years, is not presently a "resident" of New York. Bower & Gardner Memorandum at 12-14; Bower & Gardner Reply at 1-5; Jones, Day Reply at 3-4. Moreover, the retrocessionaires claim that "simple authorization to do business" in New York is insufficient for a foreign insured to invoke the statute; rather, the foreign insured must actually be conducting business in New York before it can seek pre-answer security. On this basis, the retrocessionaires also suggest that application of § 1213 to this action will violate their due process rights. Bower & Gardner Reply at 4-5. As a policy matter, the retrocessionaires point out the irony of allowing a Kentucky liquidator to travel to a New York court and invoke a security requirement intended to prevent New York residents from having to resort to "distant forums" to enforce

rights under their insurance policies.[6] Jones, Day Memorandum at 10; see N.Y.Ins.Law § 1213(a).

In addition, the retrocessionaires argue that § 1213(c)(1) was intended to apply to coverage claims, that is, to disputes over whether a given claim falls within the terms of a valid insurance policy. Jones, Day Memorandum at 10-11; Jones, Day Reply at 4. In this action, the retrocessionaires point out, the validity of the reinsurance treaty itself is at issue. They argue that it would be unfair to require them to tie up a huge amount of assets — thereby giving the Liquidator undue leverage — where, if they prevail, it will be found that the Liquidator holds no enforceable rights against them at all.

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6. The retrocessionaires suggest that the Liquidator's motive for bringing this suit in New York is to take advantage of the security requirement of § 1213. They contend that Kentucky's cognate statute, Ky.Rev.Stat. § 304.11-040(7) (1987), exempts reinsurers from posting pre-answer security. Bower & Gardner Reply at 2 & n. 1; LeBoeuf, Lamb Memorandum at 6 & n. 3. It is not at all clear that this is the case. Their argument is that because § 304.11-030(1)(b) allows reinsurers to transact business in Kentucky without a certificate of authority, and because § 304.11-040(7) requires unauthorized insurers to post security or procure a certificate of authority before filing a pleading in a court action, reinsurers are not subject to the security requirement. On the other hand, plaintiff insists that the retrocessionaires would be subject to the pre-answer security requirement in Kentucky. See Plaintiff's Memorandum at 5; Plaintiff's Sur-Reply at 18-19. Moreover, at a conference before me on February 2, 1990, plaintiff offered to bring this action in Kentucky if defendants would consent to jurisdiction there; the Bower & Gardner defendants objected to any such change of venue. In any event, because I find that § 1213 expressly applies to reinsurers, I need not consider the scope of Kentucky's cognate statute.

Jones, Day Memorandum at 11. Moreover, the retrocessionaires claim that the merit of their defense is clear, given Judge Keenan's recent finding in Delta Holdings, Inc. v. National Distillers and Chemical Corp., 85 Civ. 3439 (April 10, 1990), that Delta Re had been insolvent long before it solicited the retrocessionaires' participation in the Treaty. See Letter of Thomas Newman, Esq. to Magistrate Roberts dated April 18, 1990; Letter of William Primps, Esq. to Magistrate Roberts dated April 19, 1990; see also Complaint ¶ 45 (alleging that Delta Re "was technically insolvent as early as 1982").

Finally, defendant Transnational Limited points to Regulation 98, N.Y.Comp.Codes R. & Regs. tit. 11, §§ 32.0-32.4 (1982) ("Regulation 98"), promulgated by the New York Superintendent of Insurance, which it claims would be superfluous if § 1213(c)(1) were construed to apply to reinsurers. LeBoeuf, Lamb Memorandum at 7. Regulation 98 requires reinsurance intermediaries — insurance agents or brokers — to include in any reinsurance contracts with unauthorized reinsurers a provision for the appointment of a local attorney for service of process. N.Y.Comp.Codes R. & Regs. tit. 11, § 32.1(e).

Plaintiff, on the other hand, makes several statutory arguments to demonstrate that § 1213(c)(1) applies to reinsurance treaties. First, plaintiff claims that the broad statutory definitions of "contract of insurance" and "insurer" contained in Article 11 of the New York Insurance Law encompass contracts for reinsurance and reinsurers. See Plaintiff's Sur-Reply at 5-6; N.Y.Ins.Law §§ 1101(a)(1), 107(27). Moreover, plaintiff points to N.Y.Ins.Law

§ 1101(b)(2)(G), which states that § 1213 is applicable to "transactions with respect to the reinsurance of risks of authorized insurers * * *." See Plaintiff's Sur-Reply at 7-8. Plaintiff also notes that while N.Y.Ins.Law § 1213(e) specifically exempts certain classes of insurance, it does not single out reinsurers for exemption. Id. at 8-9. Plaintiff further contends that the presence of a comprehensive consumer protection scheme in Article 31 of the New York Insurance Law undercuts the retrocessionaires' argument that § 1213 was intended as a consumer protection measure. Plaintiff notes that Article 31 specifically exempts reinsurance contracts (see N.Y.Ins.Law § 3108), an indication that when the legislature wishes to exclude a class of business from the reach of an insurance law, it does so explicitly. Plaintiff's Sur-Reply at 9-10. In addition, plaintiff refutes Transnational Limited's argument that Regulation 98 is inconsistent with the application of § 1213 to reinsurers, claiming that "Regulation 98 and § 1213 are simply different ways of meeting the legislative objective of assuring the accountability of foreign or alien insurers." Id. at 11 n. 10. Plaintiff also points out that Regulation 98 does not apply to the Treaty at issue, which was arranged directly between Delta Re and the retrocessionaires, not through reinsurance intermediaries. Id.

Plaintiff asserts that Delta Re was authorized to do business in New York when the Treaty was signed, did most of its business here, and had all of its employees stationed here, and is therefore a "resident" within the meaning of § 1213(b)(1). Plaintiff's Memorandum at 6. Moreover, plaintiff argues that even if Delta Re was not a "resident" of New York, § 1213 requires only that a corporation invoking

the statute be "authorized to do business" in the state. Id. at 6-7. Plaintiff further contends that § 1213 is triggered when an unauthorized insurer engages in any of the activities listed in § 1213(b)(1)(A)-(D), so that the Liquidator's right to invoke the security requirement is not affected by the fact that Delta Re is no longer authorized to do business in New York. Plaintiff's Sur-Reply at 13.

Finally, plaintiff claims that the retrocessionaires' substantive defenses are irrelevant to the application of 1213(c)(1), since the statute requires security before the defendant files any responsive pleading. Plaintiff's Sur-Reply at 16-17.

DISCUSSION

Section 1213 of the New York Insurance Law is primarily a long-arm statute, derived from the Uniform Unauthorized Insurers Act. The statute addresses the "concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." N.Y.Ins.Law § 1213(a). The principal purpose of the statute, then, is to subject unauthorized foreign and alien insurers[7] who have transacted business in the state to

7. A "foreign insurer" is "any insurer incorporated or organized under the laws of any state * * * other than [New York]." N.Y.Ins.Law § 107(21) (McKinney 1985). An "alien insurer" is "any insurer incorporated or organized under the laws of any foreign nation * * *." Id. § 107(5).

the jurisdiction of the New York courts. The statute accomplishes this purpose by declaring that certain activities on the part of the foreign unauthorized insurer constitute the appointment of the New York Superintendent of Insurance as its attorney for service of process. Id. § 1213(b)(1). In addition, the statute requires the unauthorized insurer, before filing a pleading in a court action, to deposit money or file a bond to insure a fund for the payment of any judgment obtained in the action. Id. § 1213(c)(1)(A); see Dean Construction Co. v. Agricultural Ins. Co., 42 Misc.2d 834, 835, 249 N.Y.S.2d 247, 248-49 (Sup.Ct. Nassau County 1964) (discussing statutory predecessor to § 1213). The activities that bring the unauthorized insurer within the reach of the statute are: "(A) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (B) the solicitation of applications for such contracts, (C) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (D) any other transaction of business." N.Y.Ins.Law § 1213(b)(1).

It is notable that Section 1213 falls within Article 12 of the New York Insurance Law, entitled "Organization and Corporate Procedure." Section 1212 requires the appointment of the Superintendent of Insurance as attorney for service of process by authorized domestic, foreign, and alien insurers. Section 1214 prohibits insurance agents or brokers from procuring or soliciting policies or certificates of insurance from foreign insurers who have not appointed the Superintendent of Insurance as attorney for service of process. Taken together, these provisions attempt to guarantee that all insurers transacting business in the state

— authorized and unauthorized — will appear in suits brought against them in New York courts.

Section 1213 does not explicitly state that it applies to unauthorized foreign or alien reinsurers; nor does the rather sparse case law construing the statute address this issue. However, § 1101(b), the provision that defines what constitutes "doing an insurance business," appears to deal with the question head-on. Section 1101(b)(2) provides:

> Notwithstanding [the activities listed in subsection (1) that constitute "doing an insurance business"] the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but [§ 1213] of this chapter shall nevertheless be applicable to such insurers:
>
> * * *
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

N.Y.Ins.Law § 1101(b)(2) (emphasis added).

Thus, although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, it appears that it

did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and security requirement. The only language in § 1213 itself that lends support to defendants' theory that the section does not apply to reinsurers is the statement of legislative purpose, contained in subsection (a), that the provision was enacted to protect residents holding "policies of insurance." While a reinsurance treaty is arguably not a "policy of insurance" or even a "contract of insurance,"[8] the contention that the legislature therefore did not intend § 1213 to apply to reinsurance must be rejected in light of the express language of § 1101(b)(2)(G).

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8. Courts have recognized reinsurance as a distinct class of insurance. See, e.g., Liberty Mutual Ins. Co. v. Gibbs, 773 F.2d 15, 18 (1st Cir.1985) (reinsurance contracts are distinct from contracts " 'insuring against liability' "); Security Mutual Casualty Co. v. Century Casualty Co., 531 F.2d 974, 977 (10th Cir.), cert. denied, 429 U.S. 860 (1976) ("a reinsurance treaty is a contract for insurance, not a contract or policy of insurance"); In re Liquidation of General Indemnity Corp., 274 N.Y. 510, 511, 10 N.E.2d 523, 524 (1937) (reinsureds are not "policyholders"); 19 Couch on Insurance 2d § 80.1, at 624 (rev. ed 1983) ("As a general rule, a reinsurance treaty is an indemnity contract as opposed to one for liability."). The principal significance of this distinction appears to be that "[i]n contrast to an insurer's obligation to pay and defend against its insured's liability whether or not the insured has paid injured third parties, the reinsuer's liability is conditioned upon the insurer's prior payment of loss." Skandia American Reinsurance Corp. v. Schenck, 441 F.Supp. 715, 724 (S.D.N.Y.1977). Consequently, the insured is not considered a third-party beneficiary of the reinsurance treaty, and cannot recover against the reinsurer, even if the insurer becomes insolvent. Id.; see 13A J. Appleman & J. Appleman, supra, § 7695, at 537-38.

Turning to the question of who may invoke § 1213, the statute extends its protections to "residents of this state or to corporations authorized to do business therein." N.Y.Ins.Law § 1213(b)(1)(A). In Clifton Products, Inc. v. American Universal Ins. Co., 169 F.Supp. 842 (S.D.N.Y.1959), the court found that the plaintiff, an Ohio corporation, could not obtain jurisdiction in New York over the defendant, a Rhode Island insurance company that had delivered a policy to the plaintiff in Ohio. The plaintiff's only apparent contact with New York was that it had employed a New York insurance broker to place the risk. In holding that the statutory predecessor to § 1213 did not apply to nonresident plaintiffs, the court noted that the statute "protects only New York residents in suits based on policies delivered to them in this state." Id. at 845.

In Aero Associates, Inc. v. La Metropolitana, 183 F.Supp. 357 (S.D.N.Y.1960), the court permitted the plaintiff, a New York corporation acting as manager for three authorized foreign insurance companies, to invoke the statutory predecessor to § 1213 to obtain personal jurisdiction over a group of Latin American reinsurers, who had delivered a contract for reinsurance, through their New York broker, to the plaintiff in New York.[9] The court observed: "Certain it is that the primary objective of the legislation was to protect New York residents but the statute went further and encompassed those corporations authorized to do business in New York." Id. at 359. The court found that its assumption of jurisdiction over the defendants was consistent with due

9. I note that the defendant-reinsurers in Aero Associates did not raise the objection that the statutory predecessor to § 1213 was inapplicable to reinsurers.

process and that, indeed, the statute "contemplated such jurisdiction in favor of foreign corporations licensed to conduct business in this state."[10] Id. at 360. The court noted that its holding was not in conflict with Clifton Products, decided one year earlier. Id.

In G.C. Murphy Co. v. Reserve Ins. Co., 101 Misc.2d 729, 421 N.Y.S.2d 1006 (Sup.Ct. N.Y.County 1979), modified on other grounds, 74 A.D.2d 235, 427 N.Y.S.2d 800 (1st Dep't 1980), the court held that the plaintiff, a Delaware corporation authorized to do business in New York, was entitled to the protection of the statutory predecessor to § 1213, including the filing of a bond, in a suit against an unauthorized Illinois insurance company that had delivered a policy to the plaintiff in New York. The court observed that

> a foreign corporation licensed to do business in the State and doing business in the State is a "resident" within the meaning of such statute; and, it would undoubtedly be a violation of [the plaintiff's] rights under the Fourteenth Amendment to the United States Constitution to be afforded less protection under law than is

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10. The retrocessionaires attempt to distinguish Aero Associates on the ground that the plaintiff was actually a New York corporation, acting for the benefit of three foreign corporations. See Bower & Gardner Reply at 3-4. However, the court's language indicates that its holding turned on the fact the statute expressly applied to foreign corporations authorized to do business in New York.

> provided to New York citizens when it is present in this jurisdiction and doing business here.

Id. at 733, 421 N.Y.S.2d at 1009.

Based on these cases, I reject the retrocessionaires' argument that the Liquidator, as a nonresident plaintiff, is not entitled to invoke the bonding requirement of § 1213(c)(1). As an initial matter, it is clear that the statute extends its protections to "corporations authorized to do business" in New York. N.Y.Ins.Law § 1213(b)(1)(A). Defendants' contention that G.C. Murphy introduces a two-pronged test which a plaintiff must satisfy to fall within the purview of the statute is simply inaccurate. Under the facts of that case, the plaintiff was present and doing business in New York; the court found that the statute required nothing more. As to whether a foreign corporation that is merely authorized to do business in New York may invoke the statute, Aero Associates and the express language of the statute indicate that it may do so.

I agree with plaintiff that the fact that Delta Re has not been authorized to do business and has not done business in New York since it was declared insolvent in 1985 is irrelevant to the court's exercise of jurisdiction over defendants in this action. When the retrocessionaires executed and delivered the Treaty to Delta Re in New York, Delta Re was present in New York and authorized to do business here. It is the transaction out of which this action arose that triggers the court's jurisdiction under § 1213(b)(1), not the status of the plaintiff at the time the action was commenced.

Moreover, I reject the retrocessionaires' contention, relying on dictum in Clifton Products, that the application of § 1213 to this action denies them constitutional due process. Although at first glance it appears anomalous for a Kentucky liquidator to bring an action on behalf of an insolvent Kentucky reinsurance company against alien and foreign reinsurers in a New York court, plaintiff's motive for bringing the action here seems clear: the action arises out of business allegedly transacted in New York and it is unlikely that plaintiff will be able to obtain personal jurisdiction over the majority of the retrocessionaires in any other forum.

Finally, turning to the retrocessionaires' argument that the security requirement of § 1213(c)(1) was not intended to apply to actions where the validity of the contract is challenged, the language and structure of the statute do not support this theory. The statute requires that security be posted before any responsive pleading is filed. Thus, defendants' defenses, no matter how meritorious, have no bearing on the security requirement. In fact, § 1213(c)(3) specifically sets out the only pertinent pre-answer defense — an unauthorized foreign or alien insurer may make a motion to set aside service on the ground that it did not engage in any of the activities listed under § 1213(b).

As to the amount of security required, I agree with defendants that the security should be for the amount that plaintiff would win as monetary damages, were this case decided in his favor. If plaintiff prevails in this lawsuit, at best he would be entitled to a declaratory judgment that the Treaty is fully enforceable (Complaint ¶ 58); a decree of

specific performance, which would require the retrocessionaires to post letters of credit to secure future payment of claims against Delta Re as they mature (Complaint ¶ 62); payment of the "reinsurance recoverables" due Delta Re, plus interest from the date they became due (Complaint ¶ 62); and attorney's fees under N.Y.Ins.Law § 1213(d).

Plaintiff seeks, as part of the $41,893,700 bond, $12,672,729 in case reserves and $22,474,900 in IBNR. Neither of these components represents fully matured claims. In fact, in an affidavit submitted by plaintiff, James Dickinson, Assistant to the Special Deputy of Delta Re, describes the case reserves as "the estimated losses payable that accrue from reported unpaid claims," and the IBNR as "the current liquidation estate's estimated liability for losses that have occurred but have not yet been reported." Dickinson Aff. at ¶¶ 7, 8 (emphasis added). No matter how accurate these estimates may be, they remain estimates until Delta Re's ceding insurance companies have actually paid out the claims, thus reducing them to a fixed amount of paid losses. It is precisely because the case reserves and IBNR are estimates of sums that the retrocessionaires will allegedly owe in the future that plaintiff was constrained to request the relief of specific performance; if the Treaty is upheld, the retrocessionaires would not be required to pay these sums to the Liquidator, but rather they would be required, under Article X, to post of letters of credit. Moreover, I strongly suspect that the retrocessionaires would challenge the amount of security requested by the Liquidator and that the issue would have to be submitted to arbitration under Article XV of the Treaty.

I therefore find that the case reserves and IBNR — representing approximately $35,000,000 of the security requested by plaintiff — are not appropriate components of a bond "to secure payment of any final judgment which may be rendered" in this action. N.Y.Ins.Law § 1213(c)(1) (emphasis added). The language of the statute does not contemplate the posting of a bond to secure the unauthorized insurer's future performance of a contract of insurance. See Dean Construction Co., 42 Misc.2d at 835, 249 N.Y.S.2d at 248-49 (purpose of the security requirement is "to insure a fund for the payment of any judgment"). The remainder of the security requested by plaintiff — approximately $7,000,000 in paid losses, that is, claims that Delta Re's ceding companies have actually paid — appears to be the amount that the retrocessionaires would be required to pay to the Liquidator as monetary damages if he prevails in this action and is thus the appropriate measure of security under § 1213(c)(1).

CONCLUSION

For the foregoing reasons, the retrocessionaires' motion to be to be relieved of the requirement of posting pre-answer security pursuant to N.Y.Ins.Law § 1213(c)(1) is denied. I find that § 1213 requires the retrocessionaires to post security in an amount that reflects Delta Re's paid losses, that is, the amount that they would be required to pay as monetary damages should plaintiff prevail in this lawsuit.[11] In addition, for purposes of determining the amount of

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11. Plaintiff may apply for an increase in the amount of security as the amount of Delta Re's paid losses increases.

security, the amount that the Liquidator has already drawn down on the letters of credit posted by the retrocessionaires should be applied against Delta Re's paid losses.

The parties are directed to attempt to stipulate to the exact amount of security that must be posted by each defendant pursuant to this Opinion and Order no later than August 17, 1990. In the event the parties are unable to agree on these amounts, they are directed to schedule a conference to be held before me no later than August 31, 1990.

SO ORDERED.

(3)

No. 00-200

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner refers the Court to page ii of the Petition.

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Rule:

United States Supreme Court Rule 10(c) 2

In its opposition to Seguros La Republica's ("La Republica") Petition for Certiorari, British International Insurance Company Limited ("BIIC") argues that this Court should deny the petition because La Republica has not presented a compelling reason to review the constitutionality of Section 1213 of the New York Insurance Law, N.Y. Ins. Law § 1213 ("Section 1213"), and because La Republica mistakenly relies upon this Court's holding in *Doehr v. Connecticut*, 501 U.S. 1 (1991). Both of BIIC's arguments are incorrect. The issue of the constitutionality of Section 1213, and the other twenty-six similar statutes which require a reinsurer to post a sizable bond before it can answer a complaint filed against it, without a court first making any determination of the merits of the plaintiff's claim, is a significant issue which this Court should address. The Second Circuit correctly recognized that this Court's ruling in *Doehr* provides the standards by which the constitutionality of Section 1213 should be determined, but it failed to properly apply that standard.

I.

LA REPUBLICA'S PETITION PRESENTS A COMPELLING REASON TO REVIEW THE CONSTITUTIONALITY OF SECTION 1213 OF THE NEW YORK INSURANCE LAW

The State of New York, as well as twenty-six other states, have enacted statutes requiring a reinsurer to post a bond of sufficient size to satisfy a judgment against it before the reinsurer may defend that suit. Petition for Certiorari, p. 18 n.3. There is no preliminary review of the merits of the plaintiff's claim before the bond is imposed, and if the reinsurer does not, or cannot, post the bond, then any answer filed by the reinsurer is stricken and default judgment is

entered against it, again without the court reviewing the merits of the plaintiff's claim. These statutes violate the reinsurer's right to due process, and the Second Circuit's ruling in this case upholding the constitutionality of this statute conflicts with this Court's decision in *Doehr*. La Republica's petition clearly presents a compelling reason for this Court to review the constitutionality of Section 1213 of the New York Insurance Law. Rules of the Supreme Court, Rule 10(c) (reasons Court may grant petition for writ of certiorari includes "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

BIIC also claims that La Republica has not sustained its burden of showing that Section 1213 is unconstitutional. BIIC first argues that when the National Association of Insurance Commissioners ("NAIC") first promulgated its Uniform Unauthorized Insurers Act in 1948, upon which Section 1213 is based, the NAIC drafted this act within the constitutional bounds set forth in *Ownbey v. Morgan*, 256 U.S. 94 (1921). Brief in Opposition, p. 5. However, the constitutional standards described in *Ownbey* are no longer consistent with this Court's current due process rulings. *Shaffer v. Heitner*, 433 U.S. 186, 194 n.10 (1977) ("We do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause"). BIIC also argues that the New York courts have "repeatedly upheld the constitutionality" of Section 1213 and its predecessor statute. Brief in Opposition, p. 6. However, three of the New York cases cited by BIIC, *Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 120 N.Y.S.2d 418 (1st Dept. 1953), and *Kaye v. Doe*, 125 N.Y.S.2d 135 (Sup. Ct. Bronx

Co. 1953), simply did not address the constitutionality of Section 1213's pre-answer bond requirement. In the fourth New York case, *Curiale v. Ardra Insurance Co., Ltd.*, 88 N.Y.2d 268 (1996), the New York Court of Appeals upheld the constitutionality of this statute only by erroneously deciding that the bond requirement was not an impairment of a property right which merited due process protection. Finally, BIIC argues that no other court has found statutes similar to Section 1213 to be unconstitutional. Brief in Opposition, p. 4. However, as La Republica stated in its Petition, none of those cases correctly applied the due process standards set forth by this Court in *Doehr*. Petition for Certiorari, p. 20. This Court should grant La Republica's petition because the Second Circuit, while acknowledging that the constitutional standards in *Doehr* are applicable to Section 1213, it did not properly apply those standards in this case.

II.

THIS COURT'S HOLDING IN *DOEHR* IS APPLICABLE TO DETERMINING THE CONSTITUTIONALITY OF SECTION 1213

BIIC argues that La Republica's reliance upon this Court's holding in *Doehr* "is completely without merit" and that "the *Doehr* line of cases is readily distinguishable." Brief In Opposition, p. 10. This argument completely ignores the Second Circuit's ruling in both this case and in *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226 (2d Cir. 1995), as well as common sense.

BIIC first argues that Section 1213 is not an attachment because it does not deprive La Republica of any property interest. Brief in Opposition, p. 11. This argument was

correctly rejected by the Second Circuit in this case, when it held that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *British International Insurance Company Limited v. Seguros La Republica*, 212 F.3d 138, 141 (2d Cir. 2000), *quoting*, *Doehr*, 501 U.S. at 12. Because Section 1213 requires a reinsurer to post a bond, the reinsurer "would have no access to those assets . . . [which] is precisely the same result that would obtain if the . . . assets were formally attached." *British International*, 212 F.3d at 142, *quoting*, *Stephens*, 69 F.3d at 1229. Thus, the Second Circuit held that the "analysis of whether § 1213's security requirement comports with due process . . . must proceed in light of the conclusion in *Stephens* that this requirement constitutes an 'attachment' of the foreign insurance company's property." *Id.*

BIIC next argues that there is no risk of erroneous deprivation of property under Section 1213 because La Republica was afforded both notice and a hearing. Brief in Opposition, p. 11. However, BIIC does not address the fact that in that hearing the court did not address the merits of BIIC's claim and it prohibited La Republica from doing so, holding that "the merits of the case have no bearing on the posting of security." Pet. App. G at 41a. Therefore, the "notice" and "hearing" afforded by Section 1213 are illusory. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (HARLAN, J, concurring) (1969) ("I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use"). The risk of erroneous deprivation is

clearly demonstrated in this case by the fact that the Second Circuit vacated and remanded a portion of the judgment entered against La Republica. Pet. App. B at 17a-18a.

Finally, BIIC argues that both its interests and those of the State of New York are sufficient to uphold the constitutionality of Section 1213. BIIC first argues that one of Section 1213's purposes is to ensure the collection "of reinsurance balances owed to it under the Facultative Certificates." Brief in Opposition, p. 12. However, this *de minimus* interest does not justify an attachment of La Republica's assets "without a hearing to determine the likelihood of recovery." *Doehr*, 501 U.S. at 16. BIIC also relies on the State of New York's interest in ensuring that reinsurers such as La Republica comply with its licensing requirements. Brief in Opposition, p. 19. However, the State of New York does not require reinsurers such as La Republica to obtain licenses in order to lawfully enter into reinsurance transactions, including those which are the subject matter of this lawsuit. Petition for Certiorari, pp. 6-7.[1] Thus, neither BIIC nor the State of New York have any interests sufficient to support the constitutionality of Section 1213.

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1. BIIC argues that Section 1108 of the New York Insurance Law, N.Y. Ins. Law § 1108, does not include reinsurers within the categories of insurers exempt from licensing requirements. Brief in Opposition, p. 19. This argument misreads the New York Insurance Law. Section 1102(a) of the New York Insurance Law, N.Y. Ins. Law § 1102(a), provides that "No person, firm, association, corporation or joint-stock company shall do an *insurance business* in this state unless authorized by a license . . ." (emphasis added). However, the term "insurance business" does not include reinsuring risks of insurance companies. N.Y. Ins. Law. § 1101(b)(2)(G). Since La Republica is not engaging in an "insurance business," it does not need an insurance license. Section 1108 only applies to certain insurers otherwise engaging in an "insurance business" which the New York legislature has determined do not need a license to do so.

CONCLUSION

For the reasons stated herein, and in the Petition, this Court should grant the writ and reverse the decision below.

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